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CODE

OF

PUBLIC INSTRUCTION

OF THE

STATE OF NEW-YORK.

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SUPERINTENDENT OF PUBLIC INSTRUCTION.

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PREFACE.

THE following pages contain a selection from the decisions rendered by the Superintendents of Common Schools, and their successor, the undersigned Superintendent of Public Instruction, since the publication of the volume known as Common School Decisions, by Gen. Dix, in 1837. Very many of the decisions made in the intervening period relate to the construction of statutes which have been so materially changed as to render their interpretation no longer important to the school officers. Many more were devoted to the discussion of questions relating to the expediency of proposed alterations in the boundaries of districts, the location of school-houses, and other subjects of merely local interest. Those only have been reported which convey instruction upon points which the experience of the department has shown most frequently to give rise to doubts and misunderstanding, and to embarrass the practical administration of our school system. Of such points there are very few which have not been decided in numerous cases, but the repetition of similar decisions has been avoided as far as practicable.

The legislature having directed the publication and distribution of the laws relating to schools in the same volume with a Digest of the Decisions of the State Superintendents, while the latter was in preparation, it seemed advisable to arrange, in the form of comments upon the various sections of the statutes, much that would otherwise have found a place in the Digest. Greater facility of reference was thus secured, and the opportunity offered of giving such instructions as may serve to anticipate and prevent the most common occasions of difficulty. These may seem to the intelligent reader as in many instances unnecessarily minute, and as presupposing an almost incredible inattention on the part of school officers to the ordinary forms of business and to the

precautions against litigation, which every prudent man is in the habit of observing. The experience of the department, however, suggests the apprehension that the error will be found rather on the side of omission than in giving information that is not required. The changes in the law affecting the local administration of district affairs have been very trifling, but the constant repetition of inquiries in regard to the modes of proceeding under it, indicates that the exposition cannot be made too specific or minute for the practical wants of a class of officers so frequently changing, and so destitute of facilities for obtaining legal advice, as those of the school districts.

It is but just to add that the legal comments, which will be found under the various sections of the laws, have been the work of E. PESHINE SMITH, Esq., Deputy Superintendent, and that the whole work has received the benefit of his experience in the department, and of his legal knowledge and acumen.

V. M. RICE,
Superintendent of Public Instruction.

ALBANY, *November* 25, 1856.

DIGEST OF DECISIONS

OF

STATE SUPERINTENDENTS.

Commissioners cannot declare void proceedings of their predecessors, though they may annul, or rescind them.

THE town superintendents of the towns of Seneca, Gorham and Benton, declared illegal the proceedings of a previous board, forming District No. 13, from parts of the said three towns, for an alleged want of authority. The district, if legally organized, might have been annulled, but they had not power to declare void the proceedings of their predecessors. The law confers no such power upon them. The question of illegality must be referred to the Superintendent of Public Instruction, or determined by some other competent tribunal.

Per Dix, August 19, 1837.

An adjourned meeting cannot rescind an election of district officers.

Per Dix, November 18, 1837.

Nor can an officer, once elected, be displaced by vote of district.

Per Dix, November 9, 1838.

Non-resident children attending the district school, without any previous contract or agreement with the trustees, are on the same terms as other children.

Per Dix, October 28, 1837.

A tax may be levied to finish the erection of a school-house commenced by subscription, provided the district own the site; if not, the subscribers must first relinquish their title to the district.

Per Dix, May 11, 1838.

Notice of alteration of a district should be served on dissenting trustee.

Per Dix, February 17, 1838.

Notices should be served on opposing and not on consenting parties.
Per Dix, April 9 1838.

Public money cannot be paid for wages of a past year. In other words, public money apportioned for any year, must be expended for services performed within that year.
Per Dix, March 26, 1838.

Any lawful meeting may, by vote, appropriate the public money on hand or to be received.

Notice of meetings should specify the objects for which they are called; but omission is not fatal. An aggrieved party may appeal.
Per Dix, April 20, 1838.
Per Spencer, March 7, 1840.

Inhabitants have no right to reëlect against his will, a person whose resignation has been accepted.

Daniel Lawrence, whose resignation of the office of trustee of District No. 2, Hamburgh, had been accepted by three justices of the peace of said town, was subsequently reëlected.

The election was set aside on appeal. The law having constituted the justices sole judges of the propriety of a resignation, their decision is final, and the inhabitants have no right to disregard it.
Per Dix, May 9, 1838.

A teacher who does not keep a proper list of pupils and their attendance, cannot recover his wages. The teacher's list is the basis of a rate bill, which the trustees cannot legally make without it.
Per Dix, April 21, 1838.

The trustees of District No. 6, Coxsackie, refused to pay Daniel Searles, a certain balance claimed by him as due for his services as teacher. He admitted that he could not furnish them with an attendance list, as required by law, but alleged that the former trustees had directed him to charge different rates of tuition for different studies. Held, that the contract was illegal, and could not be enforced against their successors. No legal rate-bill could be made out, for want of a legal attendance list.
Per Spencer, July 7, 1841.

Verbal notice to clerk to call a district meeting is sufficient. A trustee who attends cannot object that he did not authorize the call.
Per Dix, November 24, 1838.

In an appeal to set aside the proceedings of a meeting on account of illegal voting it is not enough to allege that a man was not a legal voter. The specific grounds of disqualification should be set forth.
Per Dix, December 1, 1838.

Trustees may contract with a teacher to pay him any stipulated sum for wages; but a tax, or rate bill, cannot be levied for his board separately, as contradistinguished from the remainder of his wages. He must provide for his own board, or it must be paid for by the voluntary contributions of the inhabitants.

Per Dix, December 15, 1838.

A pupil should not be dismissed from school, except for a degree of moral depravity, which would render his association dangerous to other scholars, or for violent insubordination which would render it impracticable to maintain discipline and order.

Per Dix, January 19, 1839.

A school district cannot by vote authorize trustees to borrow money on its credit. If the trustees advance money to purchase a library, they may repay themselves out of money voted by tax for that purpose, or received from the state, but they cannot charge interest.

A tax for contingent expenses is erroneous; but the district may vote to raise a specified sum, to be expended in the purchase of enumerated articles.

Per Spencer, March 29, 1839.

A two story school-house may be built upon land leased, with the agreement that the rent, or consideration of the grant, shall be the use by the lessor, of the upper story out of school hours.

The consistory of the Reformed Dutch Church, in the town of Greenbush, granted to District No. 2, of said town, a lot of land for a school-house site, so long as the same should be used for that purpose, reserving an annual rent. Subsequent to the execution of the lease, an agreement was entered into between the trustees and the consistory, that the school-house should be built with two stories, and that when the upper story was not wanted for school purposes, the consistory might use it, and such use, while permitted, should be in full payment for the rent. With full knowledge of this agreement, the district, 33 to 7, voted to raise a tax of $400, to procure the site and erect a school-house. Held, that the use of the upper story, by the consistory, was a fair equivalent for the rent, and that the agreement was not improper or illegal.

Per Spencer, April 23, 1839.

The public money must be applied to the payment of the wages of qualified teachers, and for no other purposes. Debts due the district, or bought by the trustees, cannot be offset against the wages. Nothing but payment to, or on the order of, the teacher is a compliance with the law.

Per Spencer, April 23, 1839.

In the absence of any legal provision on the subject, the district may fix the date of their annual meeting, three, six, or nine months, or any

time within the ensuing year. The district officers, however, should not be elected until the time is fixed, in order to prevent any dispute as to their term of office.

Per Spencer, May 6, 1839.

School may be opened with prayers, provided that it be done before school hours, and that there be no compulsion to enforce attendance.

In an appeal to the superintendent, certain inhabitants of District No. 15, Barre, complained that the teacher, with the permission of the trustees, "made prayer part of school discipline." The trustees replied that they had permitted the teacher to have prayers, on condition that they should be had previous to school hours, and they alleged that he did not occupy school hours. The superintendent dismissed the appeal, with the following remarks:

"In this conduct of the trustees, the superintendent can perceive no cause of complaint. Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking his blessing; the other, of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer, have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to the time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. The simple rule, so to exercise your own rights, as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools. In the present case, the superintendent thinks the trustees had lawful right to permit the teacher to commence the business of the day by public prayer, with the children of such parents as desired it; and they were also right in directing that such exercises should not take place during school hours, nor form a part of school discipline."

Another branch of this first question is, whether the teacher has a right to compel the children to kneel, during prayer, or to dispense with their ordinary business.

The answer already given proceeds upon the principle that prayer is no part of the business of a common school, but that parents may place their children under the superintendence and government of a teacher for that purpose. Of course his jurisdiction would extend to that only. But others have no right to disturb the performance of what is considered a sacred duty. As the one class is required to abstain from all attempts to compel the children of the other class to engage in an exercise which the latter disapprove, so the latter should abstain from

interrupting such exercise, and should instruct their children, accordingly, not to enter the school room, until the usual hour of commencing school, and not to disturb those within by any noise, or other conduct calculated to annoy them. And the teacher should allow the children of all parents, who do not desire them to engage in prayer, to withdraw from the room, or to absent themselves from it. But if they come into the room before the usual school hours, and choose to remain there during prayer, they must preserve the order and decorum befitting such an occasion.

Per Spencer, May 13, 1839.

District officers cease to be such, when set off from an old district to a new one.

If a new district (15) was erected out of No. 2, and No. 2 was not declared a new district, it is in law the same district, although its territory may be diminished; and the trustees and officers in office at the time of the division, and residing in No. 2, will continue such during the year for which they were elected. But such of them as reside in District No. 15, and do not change their residence to No. 2, cease to be officers of No. 2, by virtue of the provision of the statute, which declares in reference to a local officer, that a vacancy is created by an incumbent *ceasing to be an inhabitant* of the district for which he was appointed.

Per Spencer, May 15, 1839.

A person elected at the same time, clerk and trustee, and accepting the office of trustee, vacates the clerkship, and a new clerk must be elected or appointed in his place.

Per Spencer, May 22, 1839.

Trustees are bound to open a district school, whenever the inhabitants or any of them, are willing to bear the expense, and the district cannot abridge their powers.

One inhabitant with four children, and another with two children, requested the trustees of District No. 12, Vernon and Stockbridge, to open a summer school. The trustees refused, assigning as a reason that they desired a division of the district, and were disposed to render the present organization as little beneficial as possible.

It was held that it was their duty to have a school kept whenever there was a number of children to attend, sufficient to defray the expense; or if a portion of the public money had been assigned to each term, whenever the public money and rate-bills would defray the expense. The duty is as applicable to summer as to winter schools. The very object and business of their office is to provide schools, and no district meeting can abridge their powers, or relieve them from the performance of their duty.

Per Spencer, July 17, 1839.

The dissolution, or annulling, of a district is not an alteration.

When an alteration is made, the presumption arises that something of the original remains. Its total destruction precludes such a presumption.

Under the constitution of 1822, the legislature could not pass any law creating, continuing, *altering*, or renewing any body politic or corporate without a vote of two-thirds in its favor.

The legislature repeatedly passed laws repealing charters, on the ground that a repeal was not an alteration, and that such repeal did not come within the *spirit* of the provision, any more than it did within its *letter*.

Per Spencer, July 26, 1839.

A school district cannot delegate the power to select a school-house site. A designation should be specific as to location and size.

The inhabitants of District No. 15, in the town of Smyrna, at their first meeting, resolved that the trustees purchase a site for the school-house, on the corner of Benjamin Hartwell's land, or on Seth Shepard's land where the cooper's shop now stands.

The trustees selected the corner of Benjamin Hartwell's land, paid forty dollars for the site, and contracted for the erection of a house.

They then called a special meeting, for the purpose of ratifying what they had done, and raising money to finish the house.

The meeting, by a vote of 26 to 12, refused to ratify their selection, and passed a resolution that the site should be "at a certain beech tree in widow Brown's hollow."

The supreme court, in the case of Benjamin vs. Hall, 17 Wendell, 437, decided that the district could not delegate the power to designate a school-house site to the trustees. It cannot make any difference whether a general authority to select is given, or whether the authority is to choose between two points.

The designation made by the special meeting is too indefinite. Verbal explanations, not a part of the record, though given at the meeting, cannot be permitted to locate the spot. The vote was utterly void for uncertainty.

Per Spencer, August 26, 1839.

Any subsequent resolution, directly, or necessarily repugnant, to a previous one, repeals it.

Per Spencer, September 7, 1839.

That part of the district library, purchased with money raised by tax upon the district, may be sold.

Per Spencer, September 17, 1839.

Three qualified voters constitute a valid meeting.

The annual meeting of District No. 9, Erin, and No. 12, Elmira, in 1839, was duly notified and held, at the time and place appointed at

the last preceding annual meeting. The district clerk and two other persons only were present. The proceedings of the meeting were regular. The law has not specified what number shall constitute a district meeting, and when the notice has been fair and public, and the meeting held at the usual time and place, and the proceedings regular, it must be deemed valid.

Per Spencer, October 22, 1839.

A trustee cannot be librarian.

A librarian is subject to the direction of the trustees, and responsible to them. There is an incongruity in a man being subject and responsible to himself. There is the same incompatibility between the offices of librarian and trustee, as collector and trustee.

Per Spencer, November 25, 1839.

When a school-house is so decayed as to be no longer adapted to its purposes, the district may raise money by tax to build a new one, by a majority vote, and without a special notice of the intent to propose such a tax, at an annual or a special meeting.

Per Spencer, January 15, 1840.

The occupancy of a school-house sufficient notice to purchaser of land.

Twenty years previous to the date of appeal, District No. 6, Lincklaen, had taken a lease of a site for the school-house, for as long a period as the same should be occupied for a district school. James S. Graves purchased the land and appurtenances, without any reservation, and forbade the trustees from entering upon it, or from occupying the school-house.

Mr. Graves purchased the land subject to the lease, and the fact that the land was occupied by the district for a school-house and site, was sufficient notice to him. The district has a rightful claim to the possession of the land under the lease, and should take legal measures to assert their right. The occupancy is sufficient notice to the purchaser of the title of the district, and he is bound to ascertain it at his peril, notwithstanding the omission to put the lease upon record.

Per Spencer, January 23, 1840.

Trustees are not empowered to receive a note in payment for a tax imposed by them, and cannot maintain an action to enforce payment.

The trustees of District No. 8, in the town of Mentz, took a note from S. P. Clark in payment of a tax assessed upon his farm. Upon appeal it appeared that Mr. Clark had been erroneously taxed in District No. 8, while he was yet a resident of District No. 7. Held that the note was void, and could not be collected, even if the tax had been legally assessed.

Per Spencer, March 24, 1840.

An order by a board of officers of two towns, dissolving a joint district, and setting off a part thereof to a district partly in a third town, valid as to dissolution, but illegal as to annexing part to district partly in third town.

The commissioners of Argyle and Fort Edward, on the 31st December, 1838, dissolved joint District No. 4, in said towns, and annexed one portion thereof to district No. 15, in Argyle, and the residue to District No. 3, in the town of Fort Edward. District No. 3, was a joint district, partly in Fort Edward and partly in Greenwich; and the commissioners of the latter town were not notified of the meeting and did not attend. There may be cases where an order, void in part, is void altogether. In this the commissioners of Argyle and Fort Edward had jurisdiction over District No. 4, but not over District No. 3. The order for the dissolution of District No. 4, is therefore valid, and having no necessary connection with that part of the order annexing a part thereof to District No. 3, must stand, while the part of the order affecting District No. 3, is void, for want of jurisdiction.

Per Spencer, May 21, 1840.

The same principle is established in another case.

On the 20th of April, 1840, the commissioners of the towns of Newstead and Clarence, set off from joint District No. 4, in Clarence and 2 in Newstead, all that part of the district lying in the town of Clarence. Subsequently, and on the same day, the commissioners of Clarence formed District No. 19, in said town, out of the territory so set off, and a portion of District No. 5 in the same town; and also the farms of four persons set off on the same day by the commissioners of Clarence and Lancaster from two joint districts in said towns.

The acts of the commissioners were strictly in compliance with the law. A joint board was first formed and the inhabitants intended to be annexed to the new district were set off from the joint districts. Then the commissioners of Clarence within whose separate jurisdiction the inhabitants so detached reverted, very properly annexed them to the new district. This was the true mode of procedure. The powers of the joint board ceased when the territory ceased to be a joint district.

Per Spencer, June 18, 1840.

Notice of alteration must be given before order can take effect.

When a district has been altered without the previous consent of the trustees, a notice in writing of the alteration must be served upon them. This notice is essential to the completion of the transaction, as without it the order cannot take effect. It cannot be presumed that the notice has been given because the order has been made. The doctrine of presumption applies only to those cases where the act in question should have been performed in the regular and ordinary course, previous to the final act, and was necessarily incidental to it; as after a sale upon execution, a levy will be presumed. A notice in writing is a condition

subsequent to an order for alteration, and until it is given the order lies in abeyance, and without effect.

Per Spencer, July 27, 1840.

The establishment of a district by a decision upon appeal to the department, is final and conclusive; and the district is not subject to alteration by the local authorities, while the circumstances remain unchanged. But it is absurd to contend that when the circumstances under which a decision is pronounced, have materially changed, and after the districts or either of them have increased or diminished in territory, number or valuation, the local authorities are precluded from interference, by the conclusive operation of a decision, founded on an entirely different state of facts. Such a doctrine would be entirely inconsistent with reason and good sense.

Per Spencer, September 24, 1840.

The county treasurer is bound to pay over to each town all the school money apportioned to it and received by him from the state treasury. He cannot retain a per centage for receiving and disbursing, out of the money in his hands. Whatever claim he has is a charge against the county.

Per Spencer, October 12, 1840.

The trustees are bound to call district meetings when requested to do so by a respectable number of inhabitants for a legitimate object.

One of the trustees of District No. 19, partly in Liecester and partly in Perry, resigned his office, and subsequently united with fifteen others in a petition to the remaining trustees to call a special meeting to fill the vacancy, and to transact such other business as might be deemed necessary.

The trustees declined to make the call on the ground that they were apprehensive that the meeting if called, might make such disposition of the public money as would interfere with previous arrangements, and prove detrimental to the school then in operation.

The filling of an existing vacancy was a proper and legal purpose, and the meeting, if called within thirty days after the happening of the vacancy, might have elected a person. Before an appeal could be decided, the time within which the inhabitants can be called together, will have expired, and the vacancy must be filled by appointment. The trustees have no right to conjecture that a meeting will adopt measures to injure the school. The principle cannot be sanctioned for a moment, that the trustees may refuse to call a meeting of the inhabitants, upon the ground that the latter may adopt measures at variance with the views of the former, as to the interests and welfare of the district. The trustees are the representatives and servants of the district, bound to carry out and obey the will of the inhabitants, when

legally expressed, and not warranted in attempting in any manner to thwart their wishes.

Per Spencer, December 23, 1840.

Trustees cannot dismiss a teacher, on the ground that some of the inhabitants are dissatisfied with him, while they themselves are not dissatisfied.

James M. Grooty was employed to teach school in District No. 2, New Baltimore, for five months, at $11 a month, on condition that if the trustees should find any fault with him at the end of a month, they were to notify him, pay him for the month's services, and dismiss him. He taught school from the 9th November to the 21st day of January, when the trustees dismissed him, on the ground of dissatisfaction on the part of some of the inhabitants, at the same time publicly stating that they had no cause of complaint.

One month was ample time to discover faults of character, discipline, government and modes of teaching, and if the trustees did not, within that time, give Mr. Grooty notice, they could not subsequently dismiss him, and release themselves from their contract. A mere allegation that the inhabitants were dissatisfied, would be insufficient cause of dismissal at any time. They should be able to show who are dissatisfied and for what cause.

The teacher did not undertake, expressly, or by implication, to satisfy every person in the district, and it would have been absurd to require or expect it. The trustees were ordered to reinstate Mr. Grooty in his school, and at the end of five months from November 19, to pay him his wages at $11 per month, without any deduction for the time between his dismissal, and his reinstatement.

Per Spencer, March 6, 1841.

Children of non-residents are not entitled to attend a district school without permission of the trustees, and upon such terms as may be agreed upon. They cannot be permitted to share in the public money, appropriated to the district, under any circumstances.

Per Spencer, March 26, 1841.

A conditional consent to the alteration of a district cannot be given. The trustees must either give or withhold their consent. They can annex no conditions.

Per Spencer, April 12, 1841.

If the annual meeting be fairly and legally called, if there be nothing in the case to show a design to take any undue advantage of the majority, if there be no surprise or fraud of any kind, and the proceedings be in due and usual form, and those in attendance wait a reasonable time, *any number* of persons is competent to transact business. Persons who neglect to attend until an hour has elapsed after the time of meeting,

specified in the notice, and the meeting has adjourned, have no right to call for a reorganization, and much less right to organize a new meeting.

Per Spencer, May 5, 1841.

When the district has given no direction, and the trustees have already appropriated the public money to a particular term of school, the district has no further control over the disposition of it. In the absence of any specific directions by the district the trustees can apply the money as they may deem best for the interests of the schools.

Per Spencer, June 15, 1841.

When a site has been designated and a tax raised for building a school-house, a building committee may be appointed by the meeting. But contracts are to be made and money to be paid out by the trustees, and the building committee must be regarded as the agents of the trustees, to carry out the direction of the meeting. As agents of the trustees, the latter will be responsible for the fulfillment of their contracts up to the amount of the tax.

Per Spencer, June 19, 1841.

The acts of trustees, *defacto*. holding office under color of an election, subsequently declared void and set aside, are valid, and binding upon their successors.

Samuel S. Lord and John S. Panlow, were elected trustees of District No. 6, Lincklaen, at a meeting which was, on appeal, decided to be illegal, and the proceedings thereat void.

Before the decision, however, the trustees had contracted to build a school-house, in accordance with the proceedings of the meeting at which they were elected, and had hired a teacher for the winter school, and agreed to pay him $24 of the public money, and had levied and partly collected a tax of $50, voted by said meeting toward building the school-house.

Their successors refused to fulfill their contracts, and they appealed.

Held, that until the decision declaring void the proceedings of the meeting that elected them, they were to all intents and purposes the legal officers of the district, so far as the public and third persons were concerned. They acted in their official and not in their individual capacity, for the district and not for themselves. The collection of the tax assessed by them could not be resisted; all their contracts made within their official jurisdiction were legal and binding. They were competent to transact all the business of the district. Their successors, under the decision, succeeded not merely to all their rights, but also to all their legal liabilities, and were bound to execute all their contracts entered into while acting under color of a legal election.

Per Spencer, June 25, 1841.

If commissioners withhold assent to raise a tax larger than $400, their refusal is subject to review upon appeal.

The inhabitants of the village of Cuba had been united in one district by the consolidation of two others. They had been offered a site for a school-house, in a central and commodious location, upon the sole consideration that they should erect upon it a house worth $800. They unanimously voted to accept the site and raise the tax, and applied to the school commissioners for consent to levy that sum. Consent was refused on the ground that the consolidation of the districts would be the means of breaking up the select school hitherto maintained in the district, and further that the inhabitants were unable to bear the increased burdens of such an organization.

The commissioners have a discretionary power to grant, or refuse their consent. But in this case it was not wisely exercised. They were bound to have a stronger interest in the improvement of the common schools, than in the welfare of a private select school. The inhabitants, who ought to understand their own interests, and know their pecuniary resources, had unanimously resolved to raise the tax, and shoulder the burden of the new organization. The commissioners ought not to assume that they had overestimated their ability.

The majority of the inhabitants of a district, may consist of persons destitute themselves of pecuniary resources, and desirous to avail themselves of the property of the minority to build an unnecessarily costly school-house for the district. The check, which the commissioners possess, to abuses like this, is wise and salutary, and that check was undoubtedly conferred, with a view to the possible happening of cases of this description.

The discretion exercised in this case, like that of granting or refusing a certificate to a teacher, is the subject of appeal. The authority of the superintendent upon appeal, extends to all matters arising under the school laws. His decisions have been treated as conclusive by the courts, and acquiesced in by the legislature and the people.

The commissioners were ordered to give their consent to the tax of $800.

Per Spencer, July 19, 1841.

Subsequently the same case came up a second time, on the refusal of the commissioners to obey the order of the superintendent. The previous decision was sustained and enforced in an elaborate opinion, from which we take the portions treating of discretionary powers, and the appellant jurisdiction of the school department.

"The discretion of public officers is a legal one, to be governed by sound principles, and not by the capricious whim of the individual, and the instances are frequent, where courts of law regulate and direct the exercise of discretionary power by officers, where third persons have an interest in such exercise. The only discretion which courts do not undertake to control, is that which, according to Justice Sutherland, 5 Wendell, 125, 'is not and cannot be governed by any fixed principles

and rules.' Few matters would seem more susceptible of the application of fixed rules, than the size of a school-house, necessary to accommodate properly a given number of children, the amount of money required for its construction, and the ability of a district to raise a given sum. So that even upon any of the ordinary processes of law, this would be a case where the discretionary power of commissioners could be regulated and controlled. But when we consider that a tribunal has been erected for the express purpose of supervising all the officers engaged in the administration of the common school system; that there is scarcely an act to be performed by them, which does not involve more or less discretion, and that an appeal is given from all these acts in the most comprehensive terms; we see at once that the rules which would govern legal proceedings on common law process, are not the proper guides, and that we must recur to broader and more enlarged principles.

"The word appeal comes from the civil law, and its nature and office is to substitute the appellate tribunal for that whose acts are examined; and if the case be one involving discretion, then the appeal invokes that very discretion in the superior, in the same manner and to the same extent that it was possessed by the inferior. 'The cause is in the appellate court' say the supreme court of the United States, in 1 Wheaton 112 'as if it were in the inferior court."

"The great majority of cases decided in this department are those involving more or less discretionary power.

"The statute itself enumerates many cases that are entirely of a discretionary character. The decisions of district school meetings upon any subject upon which they are competent to act, such as the designation of the site of a school-house, the amount of money to be raised by tax, and the omission to levy taxes, involve large discretion, but are nevertheless subject to appeal by the express words of the law. The formation and alteration of school districts, must be guided by a sound judgment upon various facts and circumstances, such as the number of children, the amount of taxable property, the extent of territory, and the convenience of the inhabitants. Some fixed rules may be applied, but in many cases, the decision must depend on general ideas of the propriety and fitness of things.

"Among cases not enumerated, and which fall within the fourth subdivision of the section conferring the right of appeal, the following are of daily occurrence, viz: The granting, or refusing a license to a teacher; the valuations of school-houses, or other property on the formation of new districts; the refusal of trustees to call special meetings, to employ teachers, or to keep the schools open, and the employment and dismissal of teachers; the government of the school, the admittance, and expulsion of scholars, &c. Indeed it would be difficult to specify a single act which any officer concerned in the administration of the system may perform, that has not been the subject of appeal.

"The present case presents less opportunity for the exercise of discretion than many of those above enumerated. The expense of a school-house must depend upon its size and materials. Its size, the number

of rooms, and the proper conveniences, will depend upon the number of children in the district of the proper age to occupy it. The only other element for consideration, is the ability of the district, a fact easily ascertained from the assessment roll. There is, therefore, nothing in the nature of the decision to be made, to prevent its being reviewed and examined upon fixed and settled principles.

"So far as our laws afford any analogy in cases of appeal, there does not appear to be any distinction between discretionary and other cases. Thus appeals to county judges from commissioners of highways, respecting the opening, altering and discontinuing of highways, necessarily involve that discretion which depends on private judgment.

"Upon the most mature deliberation then, I cannot doubt that the granting or refusing of a certificate, that a larger sum than $400 should be raised for building a school-house, is necessarily the subject of an appeal to the superintendent. And as in all cases of appeal, the statute declares his opinion to be 'final,' there must be some mode of giving it effect. In the present case, the commissioners decline obedience to the order, directing them to grant the required certificate. From that refusal, an appeal has been made, and the commissioners have answered. The whole system must be very defective, if there be no power to have an act performed, which the competent tribunal has determined to be legal and proper. Perhaps the appellants may enforce the order of the superintendent, by an application to the supreme court for a mandamus.

"But if there be a more direct, simple and less expensive remedy, I am bound to pursue the policy of the statute, in erecting this tribunal, by furnishing it. I think there is. It is a universal principle, recognized in England and in this country, that the court to which a writ of error, or an appeal is brought, is bound to render the judgment which the inferior tribunal should have rendered. Upon this principle this department may authorize the inhabitants of the district, at a lawful meeting, to raise the additional sum necessary for building a new school-house, that being the judgment or decision, which, in the opinion of the superintendent, the commissioners should have made. I find an order of my immediate predecessor, founded on this principle, and analagous to the one proposed to be made on this appeal, in the case of the trustees of school District No. 30, in Johnstown, in Common School Decisions, page 161. The inhabitants of the district had authorized the trustees to make such repairs to the school-house as they should think necessary and proper, and in pursuance of such authority they had contracted with a workman to make the repairs, and agreed to pay him $30. But the district refused to vote more than $25. On appeal, the superintendent, Mr. Dix held that the district was bound to indemnify the trustees; and he ordered that the trustees should make out a tax list for the whole amount, and collect it."

In pursuance of this opinion the district was authorized to raise a tax of $400, over and above the $400 which the district could otherwise raise, and the trustees were empowered to levy and collect it.

Per Spencer, September 18, 1841,

Where a teacher is improperly dismissed, he is entitled to full wages for the period named in the contract.

A. B. Braley had been employed to teach school in District No. 1, in the town of Carroll, for four months, at $13 per month. After he had taught two and a half months, some of the inhabitants withdrew their children for fear the rate bill would be too large. For various causes, others followed their example, until the school dwindled down to two or three scholars, when the trustees ordered him to quit, about three weeks before the expiration of his term, upon the understanding that he should complete it if called upon.

A special meeting, subsequently held, passed a vote to pay the teacher for the time actually employed, and no longer. The trustees refused to pay him for the full time and he appealed. He had performed, or been at all times ready to perform the contract on his part, he was duly qualified, his school had been visited by the town and county authorities and approved by them. The vote of the district could not affect the rights of the parties. The trustees were bound to fulfill the contract, and to make out a rate bill.

Per Young, March 19, 1842.

The inhabitants legally assembled at any district meeting may vote to raise a tax for any purpose authorized by law.

In case of vacancy *two* or even *one*, trustee may do any official act.

The expense of investigating a title is a part of the expense of a site, and may be legally included in a tax.

At a meeting held in District No. 3, Williamsburgh, on the third day of December, 1852, a tax of $5985.56, was voted, and among the items making up the aggregate, were $50 for investigating the title to the site, $20 for hiring a room, and $10 for furnishing fuel for a colored school and $601.81 for exemptions of indigent children and $3.75 for a tax book.

It was on appeal, objected that these items were illegal, and improperly included in the tax. It was, also, in the first instance, objected that the meeting was called by but two trustees, there being a vacancy, and but two in office at the time.

On these points the superintendent says:

When a vacancy exists in the office of trustee, the remaining trustees are expressly authorized by law to call a meeting of the inhabitants to fill such vacancy, and the inhabitants when legally assembled at any annual, or special meeting have power to raise a tax for the various purposes recognized by law. There is no doubt that two, or even one, trustee may legally do any official act during the actual existence of a vacancy in the office of their, or his colleagues.

It has been held that the expense of recording of a deed, may be included in a tax for purchasing a site, inasmuch as it is necessary to perfect the title. On the same principle, the expense of investigating the title, is a necessary part of the expense of procuring a site.

The items for exemptions, and for the rent of room and cost of fuel for the colored school, are expressly authorized by law. The trustees have power to exempt indigent persons from the payment of rate bills, and their exercise of the power is conclusive, unless set aside on appeal.

The purchase of tax book is an item not often necessary, but in a district comprising the most populous portion of a large village, divided into 5000 lots and upwards, with a valuation of $2,000,000, the expense of making up a tax list is no inconsiderable item.

Per Young, April 25, 1842.

Districts have not power at an adjourned meeting, by reconsidering and rescinding its former proceedings, to displace officers elected at the annual meeting.

District No. 19, in the town of Watervleit, held its annual meeting on the 29th of March, 1842, and elected its district officers. The meeting then adjourned to April 6, and a resolution to reconsider and rescind the proceedings of the annual meeting was adopted, by which it was attempted to displace one trustee and the district clerk, and elect others in their places.

The department has uniformly held that the officers chosen at the annual meeting are the legal officers of the district, until by resignation, death, removal from the district, refusal to serve, or expiration of term, a vacancy occurs, proper to be filled by election or appointment. When an election has been held in due form, the elective power is exhausted. And when a man entitled to hold office has been elected and consented to serve, there is no power to take it from him, or debar him from assuming its duties.

Per Young, May 2, 1842.

Children of temporary residents are to be enumerated in the annual reports of trustees.

The language of the law is that "all children actually residing in the district on the first day of January, although such residence may be temporary, shall be included in the reports of the trustees." And again. "All children included in the reports of the trustees of any school district shall be entitled to attend the schools of such district."

These provisions were evidently intended especially to meet the case of the children of laborers on our public works, and others temporarily residing in school districts.

Per Young, May 27, 1842.

An election set aside, when four voters elected at the very hour of meeting, and a majority came in half an hour.

At the annual meeting held in District No. 1, in the town of McDonough, September 12, 1841, four persons having met precisely at the hour to which the meeting stood adjourned, elected the district officers, without waiting for the residue of the inhabitants, a large majority of whom appeared within half an hour. This was a manifest case of sur-

prise. An undue and unnecessary advantage was taken of the majority of the inhabitants, and officers, not of their choice, imposed upon them.

Per Young, October 3, 1842.

An alien, who is a legal voter, may hold office in a school district.

Mr. George Oliver, an alien, who was entitled to hold real estate, having taken the necessary legal steps for that purpose, was elected trustee of school District No. 1, Bombay, on the 4th day of October, 1842.

The superintendent said he was unable to see any good cause why any inhabitant of a school district, legally authorized to vote therein, should not be admitted to a free participation in the offices of the district, or rather why he should claim an exemption from the burdens which the law devolves upon the other inhabitants of the district, in supervising its affairs from year to year. There is in reality very little analogy in cases of this description, to those against which our laws in reference to aliens were intended to provide. I am therefore disposed to hold any and every legal voter in a school district eligible as an officer therein.

Per Young, November 18, 1842.

When different parcels of property, of different quality and value, lying in two districts, are so coupled together in the town assessment roll, in one aggregate valuation, that their separate value is not apparent, and cannot be fixed, without an exercise of judgment on the part of the trustees, a new valuation should be made, and notice given.

Per Young, Nov. 23, 1842.

The wages of a teacher employed for the winter term, may be paid from the school money to be received the next spring.

Per Young, November 28, 1842.

In the absence of any specific directions by the district, the trustees may apply the public money to the summer and winter terms of a school in such proportions as they may deem just.

Per Young, January 10, 1843.

A district meeting may prescribe the terms of a contract for building a school-house.

The trustees of District No. 13, in the town of Bethany, refused to pay Daniel R. Prindle the sum of $72.50 upon his contract for building a school-house: 1st. On the ground that they had not executed the contract; and 2d. That the school-house was useless to the district because the right of way to it, over intervening lands, could not be obtained.

The district meeting, which voted the tax for building the school-house, had prescribed the terms of the contract, and the same was drawn up at the time by one of the trustees, and signed by the contractor. The trustees were directed to superintend the erection of the

house according to its terms, and to fulfill it on the part of the district. The builder fulfilled his part, and the trustees recognized the contract by superintending and directing the work.

The trustees, as the agents and servants of the district, are the proper and indeed only persons to make and execute bargains and contracts on the part of the district. But the meeting was competent to specify the terms of a contract, and in this case did so, and one of the trustees drew it, according to the terms prescribed. The contractor executed it on his part, and performed it. The trustees, by recognizing it and directing the work, were in fact parties to it, although they did not sign it.

The remaining objection is entirely groundless. The contractor for building the school-house, cannot be in any way responsible for a failure of title to the site, or a right of way to it. The question of title and right of way is between the district and the grantors, or owners of the land.

Having collected the tax of $72.50, levied to pay for the house, they are legally and equitably bound to pay over the proceeds to the contractor.

Per Young, February 3, 1843.

The law has not specified any time, within which a warrant for the collection of a tax shall be delivered to the collector.

Where a tax was voted in June, 1841, and the tax list was made out, within the time and in the mode required by law, but the warrant for collection was not issued till January 31st, the delay was held not to affect its legality, or validity.

Per Young, March 21, 1843.

A teacher, for an act of disobedience, ordered a boy, fifteen years of age, to hold out a book, of the ordinary size used in schools, at arm's length, level with his shoulder. The boy, after holding it in that position from five to eight, or ten minutes, let it fall and said he could not hold it any longer. On being ordered to hold it out again, he peremptorily refused. The teacher, then, with a curled maple rule, over twenty inches long, one and three-quarters wide, and half an inch thick, struck him from fifteen to twenty blows on his back and thighs, and in so severe a manner as to disable him from leaving school without assistance. A physician was called and found his back and limbs badly bruised and swollen. The teacher on the succeeding day, sent to him a physician, who pronounced him "very badly bruised." It was ten or twelve days before he so far recovered as to be able to attend school.

The superintendent expresses his unqualified disapprobation of a punishment, so severe and unreasonable. If the disobedience of the boy had been the result of sheer obstinacy and willfullness, it could not justify the infliction of fifteen or twenty blows with such a bludgeon, upon the back and limbs of the boy, disabling him for a fortnight. Such a measure of punishment for such an offence, would be sufficient ground for annulling his certificate.

Per Young, March 29, 1843.

When a board of town officers is called together, for the purpose of altering a joint district, a majority of the officers from *each* town must vote in the affirmative to give validity to an order for alteration.

Per Young, March 28, 1843.

The inhabitants of a school district have no power to direct the trustees to levy a tax, to pay the expenses of an arbitration in settling difficulties in a district.

The decision of the county superintendent declaring that the inhabitants of District No. 13, in voting a tax to defray or reimburse the expenses of an arbitration, and other liabilities which had accrued in settling the difficulties to which the district had been exposed for the past nine months, had transcended the powers conferred on them by law, is strictly in accordance with the previous adjudications of this department, and with the well settled principles by which it has been uniformly governed in the disposition of cases of this nature, and must accordingly be affirmed. The law has distinctly defined the purposes for which a school district tax may be voted; and the inhabitants can in no case go beyond them. That the expenses for which the tax in this case was imposed, were incurred by the trustees, under the sanction and directions of a district meeting, cannot affect the principle; the district had no legal authority to pass such a vote, and it was in no sense obligatory either upon the inhabitants or trustees. The only mode by which the trustees can be indemnified for the expenditures incurred by them, is by voluntary contribution. They cannot legally enforce the collection of a district tax for this purpose.

Per Young, September 12, 1843.

The inhabitants of a school district have power to vote a tax to pay the arrears of uncollected rate bills.

The trustees and collector are the agents of the district, and the district may hold them to a strict account, and may call upon them personally to respond for any loss incurred by their official negligence. But the inhabitants have the right to determine whether the negligence is of such a character as under the circumstances is excusable, and consequently to vote a tax to satisfy the loss.

Per Young, November 15, 1843.

A ballot for three trustees being had, and but one elected, a motion to reconsider was made, pending which the meeting adjourned. The vote to reconsider at the adjourned meeting sustained, and the election of three trustees declared valid.

At the annual meeting held in District No. 4 in Ballston, on the 2d day of October, 1843, the inhabitants balloted for three trustees. On counting the ballots it appeared that one trustee only had been elected. A motion was made to reconsider the whole proceeding in relation to the election of trustees, pending which the meeting adjourned for one week. At the adjourned meeting the motion for reconsideration

was put and prevailed and three persons were then chosen trustees by ballot.

From this proceeding the appellant took an appeal to the county superintendent, claiming to have been duly elected at the first meeting and denying the legal right of the inhabitants at the adjourned meeting to reconsider the said vote.

The county superintendent sustained the appeal.

It is obvious that the election of trustees was not completed at the first meeting. One trustee only (the appellant) was chosen; at the adjourned meeting the inhabitants took up the business of the annual meeting where they had left it, and agreed to the motion to reconsider. After such reconsideration three other persons were duly elected. The adjourned meeting was a continuance of the annual meeting, and it was undoubtedly legally competent for the inhabitants at either meeting to reconsider or rescind the whole or any part of their proceedings. Had it been otherwise the district must have been left with one trustee only.

The decision of the county superintendent must be reversed.

Per Young, November 15, 1843.

If a portion of the inhabitants in a school district meeting voluntarily withdraw therefrom, those remaining may organize and proceed to do the business for which the meeting was called.

This is an appeal from the proceedings of the last annual meeting, held in District No. 13, Walworth and Ontario. The meeting as described by each of the parties, was a strong one, and many attempts were made to elect district officers, every candidate nominated being voted down. At length a portion of the inhabitants withdrew from the meeting, among whom were the moderator and old officers of the district. The rest of the inhabitants immediately chose a new moderator and proceeded to elect district officers for the ensuing year and to transact the business usual at an annual meeting.

As there was no adjournment, but a voluntary withdrawal of the appellants, those who remained had a legal right to organize anew and proceed to business. The proceedings of the meeting are therefore declared to be regular and the appeal dismissed.

Per Morgan, March, 1848.

An annual meeting will be held to be legal, although the proper notices are not given, if the inhabitants assemble at the time and place to which it was adjourned the previous year.

Per Morgan, November, 1848.

It is the duty of the trustees, at the request of a respectable number of the legal voters of a district, to call a special meeting, although the inhabitants may have acted upon the same subject in school meeting.

A school meeting in District No. 2, in Litchfield, directed about $9 of the library money to be expended in the purchase of globes, and also voted a tax of $270, for the purpose of building a new school-house.

The trustees refused to call a special meeting for the purpose of taking a new vote of the district upon the question of building a school-house, though requested to call such meeting by fourteen legal voters of the district. The trustees were wrong in their refusal to call a district meeting, at the request of so large a number of the inhabitants. It is proper that the legal voters should have an opportunity, if they desire it, to vote again upon the question. It is therefore ordered that the trustees call a meeting, in accordance with the request of the appellants.

Per Morgan, February, 1848

An annual meeting cannot be held at any particular time, unless it was adjourned to some particular day, or the trustees have given special notice for it.

The facts in the case are as follows: For several years the annual meetings of the district had been held on the 2d Tuesday of October, according to the adjournment of each preceding annual meeting, except that the annual meeting of 1847 was adjourned without date, and the meeting held on the 2d day of October, 1848, was supposed to be authorized from the custom of the district, although the annual meeting of the preceding year did not adjourn to that date.

The meeting of the 2d Tuesday of October, 1848, was organized without the notices being given by the district clerk as required by law and without the authority of the trustees. Under these circumstances the trustees called a special meeting to be held the 24th day of November, 1848. The decision of this appeal depends upon the legality of the meeting and not upon the regularity of the proceedings, for if the decision depended upon the regularity of the proceedings, this department would regard them as valid, unless duly appealed from. But district meetings which are strictly *illegal* cannot be made legal by the lapse of time.

It is provided by § 65 of the School Laws that "at each annual meeting, the time and place of holding the next annual meeting shall be fixed," and in case the district omit to designate the day for holding its annual meeting, the trustees can appoint the time. This does not give the district authority to establish any date for holding the annual meeting for a series of years.

The meeting of the 2d Tuesday of October, could not therefore be regarded as the annual meeting of the district, on the ground that the annual meetings of former years had been held at that date by regular adjournments. Either the time should have been designated at the annual meeting of 1847, or the trustees should have called the meeting and the proper notices should have been given.

Per Morgan, January, 1849.

When the assessment roll of a town is at the county seat in the custody of the board of supervisors, and a tax is voted in its absence, it is a sufficient excuse for not making out the tax list within thirty days after it is voted. The statute is merely directory.

At a district meeting in the town of Wilson, held November 28, 1848, a tax of fifteen dollars was voted for the purpose of furnishing the school with wood during the winter.

The last assessment roll of the town being at the county seat, the trustees did not make out the tax list within the time directed by law. Thinking the tax had become void, they gave the district clerk a verbal notice, to cause a special meeting to be held the 20th day of November, for the purpose of voting the tax again. The meeting was held and the tax voted. Also a tax was voted to repair the school-house, without the proper notice being given. Objection being made by some of the inhabitants to this meeting: 1st, because the notice of the trustees was not written, and 2d, because a tax was voted to repair the school-house without the proper notice;

The trustees called another meeting, to be held the 23d December, for the same purpose. At this meeting the motion to raise the tax for wood was negatived.

From this vote the trustees appeal. According to a vote of the district at the annual meeting, the trustees assumed responsibilities in behalf of the district for which they were directed to raise a tax. Although the tax list may not have been made out within thirty days after the tax was voted, no subsequent vote of the district could change their liability to taxation for wood. The trustees acted under the direction of the district, and could not therefore be made personally responsible, if they acted in good faith. The statute relating to the time of making out a tax list is *directory* merely, and a failure to comply with it, through accident or for good reasons, does not render a tax that has been voted illegal. The trustees in this case had good reasons for not completing the tax list in thirty days, to wit, the absence of the assessment roll. The trustees are hereby authorized to levy the tax voted at the annual meeting.

Per Morgan, January, 1849.

An arbitration between the trustees of a school district and a person having a claim against it, is proper and legal, and the award binding on the parties.

Per Morgan, February 19, 1848.

It is the duty of the collector to obey the mandate of his warrant, and proceed to collect the tax or rate bill. If he neglect to do so, he is liable to be fined. The trustees cannot release the bail of the collector from the obligations of his bond.

The trustees of District No. 7, in Cuba, delivered a rate bill and warrant to the collector of the district for collection, and required of him a bond, conditioned for the payment of money received by him,

which was given. Having discovered an error in the rate bill, the trustees took it from the collector to correct it, without procuring the assent of the state superintendent. While the rate bill was in their hands, the bail of the collector demanded a release from his bond.

After waiting several days for the collector to procure new bail, and his neglecting to do so, the trustees appointed another collector. If the trustees released the bail of the collector it was at their own risk, as he was bound for the collection of the rate bill and the faithful application of the money collected. He did not cease to be the collector of the district on the demand of his bail to be released, and if he refuse or neglect to perform any of the duties of his office he is finable. His office not being vacant the trustees could not appoint another to fill his place, and the acts of the trustees in so doing are illegal.

Per Morgan, November, 1848.

When costs have been incurred against district officers in suits by or against them in the discharge of their official duties, a majority of the voters of the district may allow the amount, and the trustees assess the same by tax, or the claimants may present their claim to the board of supervisors.

The inhabitants of District No. 4, on the 4th September last, audited the account of the trustees for costs and expenses incurred in certain suits commenced by and against them and their predecessors in office, and directed the amount so audited and allowed to be collected by a tax. The superintendent on a careful examination of this case is satisfied that the account was made out and presented in good faith, that the items were such as the district were fully competent to pass upon, and that the tax directed to be levied for their payment was equitable and just.

Per Morgan, October, 1849.
8 Howard's Reports, 125.

It is illegal for trustees to enumerate children in their districts, between the ages of five and sixteen, unless they compose a part of the family of their parents or guardians or employers, if such parents or guardians or employers reside at the time in such district.

The trustees in District No. 5, in the town of Davenport, included in their annual report, dated December 31, 1848, sixty-two children under sixteen and over five years of age attending a private school under charge of S. D. Ferguson. The children attending this private school had parents residing mostly in New-York and Philadelphia, and the parents of none of them in the district. Five of said sixty-two children were orphans. It was not known to the department whether the said orphans were supported by Mr. Ferguson, or were boarded like the rest, or were sent to school by their guardians, but the latter is supposed to have been the truth.

The school law, § 118, of 1847, directs the trustees to include in their report all children over five and under sixteen years of age, who shall, at the date of such report, actually be in the district,

composing a part of the family of their parents or guardians or employers, if such parents or guardians or employers reside at the time in such district. From this law it would seem to be very clear, that not one of the sixty-two children attending Mr. Ferguson's school could be lawfully enumerated in the annual report of the trustees.

The trustees of District No. 5, were therefore wrong in including these children in their report.

Per Morgan, March, 1849.

A teacher's certificate of qualification, cannot be annulled without giving him notice and a reasonable opportunity, if he desire, to appear and be heard in defence.

The trustees of District No. 5, in Guilford, employed Mr. Matteson to teach their school for the winter term. The school commenced November 1, 1847. November 26, 1847, Mr. Carhart visited the school, examined Mr. Matteson, and gave him a certificate. December 6, the superintendent stopped at the door of the school-house and told the teacher that complaints had reached his ears in regard to his mode of punishing scholars, and intimated that his certificate might be annulled. December 20th, the superintendent served a notice upon the teacher, that he should annul his certificate unless certain complaints "arising from his mode of punishment" were cleared up. December 25th, the teacher wrote the superintendent requesting an investigation of the charges and complaints against him. January 5th, the superintendent annulled the certificate and gave notice thereof to the trustees, without having given the teacher any opportunity to reply to or explain the charges made against him, and assigning as his reasons therefor, the complaints mentioned in his previous notice, and his own observations. The trustees all signed a paper stating that in their opinion, the charges against the teacher were of a trivial character, and wholly unfounded, and that the course of the superintendent was "underhanded, prejudiced and ungentlemanly," and "meets our unqualified disapprobation."

The conduct of the town superintendent in this case will hardly admit of a reasonable explanation. He visits a school twice and then gives a teacher a legal certificate. In less than a month he gives the teacher notice of his intention to annul his certificate, without having in the meantime visited the school or required a reëxamination, and upon complaints not stated in writing or assuming any tangible shape, but so far as appears at the time, mere hearsay reports, and neighborhood gossip. The pretence that the superintendent had become satisfied from "personal observations" that the teacher was unqualified is very strangely inconsistent with the fact that he made no "personal observations" after granting the certificate. The teacher requested specifications of the charges. None were given. He desired to be heard in answer to whatever could be alleged against him. No opportunity was allowed.

A certificate of qualification should not be annulled without a statement of the complaint, and an investigation of its truth, and an opportunity

given to the teacher to be present during such investigation. Such are the rules prescribed by this department in proceedings to annul a teacher's certificate, and they are a part of the law. The superintendent proceeded in this matter without a proper and needful statement of the charges and specifications, and without giving the teacher an opportunity to be heard in defence.

It is therefore decreed that the order of the town superintendent, annulling Mr. Matteson's certificate be set aside.

Per Morgan, February, 1848.

When a town superintendent connives with a trustee to procure his resignation, and conceals it from the district, so that the inhabitants cannot elect a successor within thirty days after the resignation, and the town superintendent then makes the appointment, the department will set the appointment aside and order a new election.

Mr. Johnson, a trustee in District No. 4, Florence, proffered his resignation of office to the superintendent, which was accepted. This was done secretly, and obviously with the intention that the district should be unacquainted with it until after the expiration of thirty days, when the town superintendent could appoint a successor. It is stated that the town superintendent gave one of the trustees notice of the resignation, but it is clearly shown and is not denied by the town superintendent, that this was done with a view of *seeming* to fulfill, rather than to carry out the meaning of the law, and allow the district to elect a successor, since this trustee was very cautious about letting any one know it.

The district not being permitted to choose the trustee, the town superintendent made the appointment the day before the expiration of the thirty days. This department cannot suffer a district to be imposed upon or deprived of any privileges by the management of officers or the intrigue of individuals. It is therefore ordered that the appointment of trustee made by the town superintendent of Florence, to supply the vacancy occasioned by the resignation of Mr. Johnson, as trustee of District No. 4, in said town, be set aside, and that the trustees of said district call a special meeting of the inhabitants to fill the vacancy.

Per Morgan, February, 1489.

It is not in the power of a district meeting to control the trustees in the exercise of their duty of prosecuting delinquent predecessors for not rendering an annual account, or for not paying over a balance of money remaining in their hands. A resolution attempting to limit their power in this respect is void.

A special meeting held in District No. 18 in the town of Sodus, February 22, 1848,

Resolved, That a former resolution directing measures to be taken to collect certain arrearages alleged to be due from former trustees should be rescinded; and further, that no civil proceedings should be com-

menced by the trustees of the district for school moneys not paid over by former trustees, unless by a special resolution of the district.

Both resolutions mentioned in the appeal were adopted, under a misapprehension of the powers and duties of the inhabitants when assembled in school district meetings.

Every trustee is bound by law yearly to render an account to the district, of the moneys received and paid out by him, and to file said account with the district clerk, and also upon going out of office to pay over any balance of money remaining in his hands to his successors in office.

For any neglect or refusal to render such account or to pay over such balance, the delinquent forfeits to the use and benefit of the district the sum of $25.00, to be sued for and recovered either by his successors in office or by the town superintendent. The town superintendent (supervisor) may also sue the trustees for unpaid balances in their hands. It requires no vote of the district to authorize such suit to be brought, and a vote directing such suits to be brought, or not to be brought, is a nullity.

Per Morgan, March, 1848.

The trustees of a school district have no power to correct a tax list after a portion of the tax has been collected without permission from the department of public instruction.

The town superintendent of Crown Point, having, February 19, 1847, regularly formed a new district in said town, served a notice upon Aaron T. Townsend, a taxable inhabitant of said district, together with a copy of the order forming the district, requiring him to notify each taxable inhabitant of a district meeting to be held on the first of March following. Accordingly notice was given to the inhabitants by notifying them of the time and place of holding the meeting.

A meeting was held on the 1st of March, and adjourned to the 15th, at which a tax was voted to build a school-house. The tax list was made out by the trustees within thirty days, as required by law, and was put into the hands of the collector on the 22d of January, 1848. On the 5th of February, the trustees corrected the tax list without the approval of this department, having discovered errors in it and attaching the corrected list to the old warrant delivered it to the collector. This was an irregularity on the part of the trustees after a portion of the tax had been collected. The original tax list is the one which is in force, and if the trustees have discovered an error in it they may, after refunding any amount that may have been collected on such tax list, if the same shall be required, amend and correct such tax list in conformity to law, and redeliver it to the collector with the old warrant attached.

Per Morgan, June, 1848.

Where *one* trustee engages a teacher to teach in the place designated by a district meeting and the other *two* engage a teacher to teach in a place selected by themselves, neither is a legal school.

One trustee cannot legally engage a teacher for the district, neither can two trustees legally engage a teacher, to teach in a place designated by themselves when the district have selected another place.

The school-house in District No. 7, Guilford, Chenango county, was destroyed by fire in January, 1847. In February following, the inhabitants in district meeting, voted to hire a temporary place for the school. Accordingly a school was regularly opened on the 12th of May, 1847, in the place so designated. In the following winter *two* of the trustees opened a school in another place, without the vote of the district and gave an order upon the town superintendent for two-thirds of the teacher's money apportioned to the district, which was paid.

In the meantime, Mr. Mills, the other trustee opened a school in the house which had been designated by the district for the summer school.

Each party claims a right to the public money, but neither is entitled to it, as neither school was legally established.

In all cases the inhabitants of a district are to designate the place where the school shall be kept, and trustees alone are responsible for the expenses incurred in support of a school opened by them without this authority from the district.

One trustee cannot hire a teacher or open a school without the concurrence of at least one other trustee. Nor is any act of the trustees valid, without all being consulted, and without a concurrence of a majority.

The public money obtained on the order of the two trustees, could not be applied to the payment of their teacher, as the school was not a district school.

It is therefore hereby adjudged and decided, that the public money apportioned to District No. 7, Guilford, for teacher s wages, cannot be applied to the payment of either of the teachers employed in the schools hereinbefore mentioned.

Per Morgan, July 14, 1848.

Trustees have no lien on moneys belonging to the district, for expenses incurred by them in its behalf.

If they have been directed by the district to act, they can indemnify themselves by levying a tax without a vote of the district for that purpose.

Mr. Charles Kendall, a trustee of District No. 3, Bethany, Genesee county, had in his hands $18.18 belonging to said district. At a special meeting, held May 6, 1848, said sum was appropriated by a vote of the district for the purchase of a stove and other purposes.

Mr. Kendall claims that the district should pay him for the use of a stove bought by him, and placed in the school-house without the authority of a vote of the district. The district refused to purchase the stove of Mr. Kendall, bought by him in good faith, and he retains in his hands $3 for the use thereof. The good or bad designs either of

Mr. Kendall or of the district, can in no wise affect the case, so as to render the district liable for the stove.

Mr. Kendall also claims that he should be allowed $3, which he alleges he paid for the district, in pursuance of a vote of the district. It is not stated when nor for what purpose the $3 were expended, nor are any dates given, except that the annual report of the trustees in 1847, acknowledged the $3, as a debt due Mr. Kendall from the district. But the district clerk certifies that the records of the district contain no mention of the said $3.

Mr. Kendall fails to establish a good claim against the district for the $6.

Per A. G. Johnson, Dep. Supt., August 5, 1848.

The official acts of *two* trustees, performed without notifying or consulting the other, are illegal and void.

At a district meeting held in District No. 7, Guilford, Chenango county, September 5th, 1848, a resolution was passed directing the school to be kept in a room near Samuel Godfrey's, three years from the 1st day of April preceding.

It appears that the school-house in District No. 7, was burned in January, 1847. On the 20th of February, 1847, a meeting was held in the district, at which a site for a school-house was designated. This meeting was adjourned to the 27th of the same month, when the vote establishing the site was rescinded. *Two* of the trustees called a special meeting, to be held on the 15th of September, 1847, without notifying or consulting the other trustee. At this meeting, a tax was voted to pay for the site of a school-house, without designating the same, and also a tax to build a school-house.

The two trustees made out a tax list, dated December 24, 1847, and delivered it with their warrant attached, to the collector, on the 4th of January following, more than three months after the tax was voted. With the money thus raised, a school-house was built upon the site selected by the district, on the 20th day of February, but which was annulled by said district, at the adjourned meeting of the 27th of the same month.

The proceedings, in raising the tax and building the school-house cannot be sustained. The meeting called by two trustees, without consulting or notifying the other trustee, was illegal, and the votes of that meeting were void.

It is therefore decided that the house built upon the site not established by the district, and with a tax not legally raised, is not the school-house of the district, and that the vote of the district taken at the meeting of the 5th of September, 1848, ordering the school to be kept "in the room near Samuel Godfrey's," was legal.

Per Morgan, November 16, 1848.

Where a person voted at a district meeting on the ground that he had $50 in personal property liable to taxation, it is the duty of the trustees to include him in their tax list, even though his name be not on the assessment roll of the town, and if they neglect to do so, the department will set aside their assessment, and order them to include the person so left out.

At a district meeting held in District No. 8, Marcy, Oneida county, on the 18th day of August, 1848, a tax of $100 was voted to be raised by two equal installments, for the purpose of building a school-house.

The trustees made out a tax list for the whole amount, and after giving the notice required by law, and no one appearing before them to claim reduction, delivered it with their warrant attached to the collector.

Objection is now made to this assessment, because persons are not included in the tax list who voted at the meeting to raise the tax, upon the qualification of having personal property to the amount of $50 liable to taxation.

In making out the tax list, trustees should assess *all* the taxable inhabitants of their district, whether they are included in the last assessment roll of the town or not. But they are not required to include a person in a tax list, upon the *supposition* that he has personal property liable to taxation. They must have satisfactory proof of it, as that a person has come into possession of property since the last assessment roll of the town, by inheritance or otherwise, or as in the present case, that a person voted at a district meeting under the qualification of having $50 personal property liable to taxation.

The trustees must include such persons in their tax list. It is therefore hereby decided that the tax list made out by the trustees of District No. 8, Marcy, in which all the taxable inhabitants of the district *were not included*, is illegal.

Per Morgan, November 20, 1848.

Trustees of a school district have the sole power of making contracts relating to their districts, and of accepting the work performed under them.

The trustees of District No. 7, Depuyster, St. Lawrence county, by authority from the district, contracted with a builder to construct a school-house, to be completed by the 1st of November, 1848. The house was not completed until about a month after the time specified, and was not such an one in every particular as was contemplated in the contract.

After consultation, the trustees accepted the building, thinking it better to do so than to subject themselves and the district to further trouble.

The acceptance of the building is appealed from, on the ground that the taxable inhabitants of the district have been wronged.

The trustees of a school district have the sole power of making contracts relating to their district, and of accepting the work performed under them. And in the absence of fraud or bad faith, there appears to be no way of rendering them liable for their acts.

In the present case, there appears to be no evidence of bad faith or intention to defraud the district. This department cannot therefere interfere.

Per Morgan, January 27, 1849.

The trustees of a district are the only legal authority by which the vote of a district can be carried into execution.

At a special meeting held in District No. 2, Centreville, Allegany county, November 4th, 1848, it was voted to change the site of the school-house, by a majority of votes. The district being an altered one this vote was sufficient.

The site selected is situated at the extreme southern part of the district, making the distance which children residing in the extreme northern part of the district would be compelled to travel, about four miles.

The inhabitants authorized Mr. Asa Robbins to superintend the removal of the house, without being associated with the trustees.

The trustees forbade Mr. Robbins to move the house from the old site. He, however, disregarding their remonstrance, located it upon the new site.

The trustees of a district are the only legal authority by which the votes of the district can be carried into execution. And although the inhabitants at a district meeting may direct that the trustees shall contract with a certain person to perform certain work, and that such person shall be *associated with* the trustees in such work, they cannot authorize such person to do any act, nor can the district contract with him, except through the trustees

The vote directing Mr. Robbins to superintend the removal of the school-house without the intervention of the trustees, was therefore illegal. And Mr. Robbins became a trespasser, after being forbidden by the trustees to move the school-house.

Per Morgan, February 3, 1849.

It is the duty of the inhabitants of a school district to dispose of the old school-house, and to apply the avails thereof towards purchasing a new house and site. Neglecting so to do, this department will set aside proceedings to raise a tax for building the new house.

The points relied upon by the appellants are in substance, as follows:

1st. That the district not being an altered one, and the site having been changed by a majority vote, and without the certificate of the town superintendent, the proceedings were invalid on this account.

To this it is a sufficient answer that the district had no title to the site on which the school-house stood, and it was therefore lawful for a majority of the inhabitants to direct the purchase of a site without the certificate of the town superintendent.

2d. That the house owned and occupied by the district as a school-house, was not sold and the avails applied in diminution of the tax for building a new house.

This point, in the judgment of the superintendent, is well taken. The tax payers of the district had a right to the avails of the sales of the old house in diminution of their tax, for building the new one; and in the absence of any direction of the district on the subject, it was the duty of the trustees to have sold the house and applied the proceeds to the reduction of the aggregate amount voted by the district for the purchase of the site and the building of the house. For aught that appears to the contrary, the sum that might have been realized on the sale might have swelled the entire appropriation for building the house to a sum exceeding $400, and thereby rendered the certificate of the town superintendent necessary.

Upon the whole the superintendent sees no sufficient reason for disturbing the proceedings in this case, further than to direct the trustees, forthwith to dispose of the house formerly belonging to the district, on the best terms they can procure and to apply the avails in reduction of the aggregate amount of the tax for purchasing the site and building the house. For this purpose the further collection of the tax list heretofore made out will be suspended, and the amount collected refunded and a new tax list and warrant made out for the amount remaining after the application of the avails of the sale of the old house in accordance with law.

Per Young, January 24, 1844.

Trustees should always exercise a liberal discretion in exempting indigent persons from the payment of teachers' wages.

The appellant, Henry Pulver, complains that the trustees of District No. 9, Redhook and Milan, have not exempted him from the payment of teachers' wages, which he claims they should have done on account of his indigent circumstances.

It appears that said Pulver has a family of four children, that he is in poor health, and has no means of supporting himself and family except by his feeble exertions as a day laborer which afford a scanty supply.

Trustees should always exercise a liberal discretion in exempting indigent persons from the payment of teachers' wages. Poverty should never be an excuse for depriving any children in a district of the privileges of the school.

The trustees of said district are therefore hereby required to exempt Henry Pulver from the payment of teachers' wages in the rate bill which is now in the collector's hands, and to make his proportion of the rate bill a charge upon the district.

Per Morgan, November 28, 1848.

A school district has no authority by law, and this department will not permit the inhabitants, to give a perpetual lease for the site of a school-house. The district should have the fee simple before building.

The trustees of District No. 5, in the city of Troy, called a special meeting of the district to be held on the 29th of February, 1848. This meeting was organized and adjourned to the 27th of March following.

At the adjourned meeting, a resolution which had been introduced at the previous meeting and laid on the table for future action was called up. The resolution was amended, and as amended adopted unanimously. The resolution adopted read as follows:

"*Resolved*, That the trustees of School District No. 5, of the city of Troy, be directed by and with the consent of the school commissioners of the city of Troy, to lease from Messrs. Marshall, Belding and Christie, lots Nos. 14, 15 and 16, on the north side of Christie-street, in the 5th ward of the city of Troy, at a yearly rent not exceeding the sum of $34 per annum with the privilege of buying off said rent at seven per cent within ten years from date."

The contemplated lease was for the site of a school-house.

The only question necessary to be considered is this:

Can a school district lease or purchase a site for a school-house in the manner contemplated in the resolution before mentioned?

By the 4th and 5th clauses of § 62, chap. 480, Laws of 1847, the inhabitants of a district have power to designate a site for a district school-house, and to lay such tax on the taxable property of the district as the meeting shall deem sufficient to purchase or lease a suitable site for a school-house, and to build, hire or purchase such school-house and to keep in repair and furnish the same with the necessary fuel and appendages, and § 82 authorizes the trustees to carry such vote into effect.

The word lease used here must be interpreted to mean a lease for a limited term, one, two or three years, of a lot of land and building to be used by the district till such time as a suitable site can be procured in fee, or the conveyance of a lot of land to the district to be the property of the district so long as it shall be occupied for a school-house site.

Under the new constitution no agricultural land can be leased, for a longer period than twelve years, and although individuals in cities may still lease building lots for longer terms or in perpetuity, it is certainly desirable that land to be used as the site of a school-house should be free from any and every incumbrance.

The statute confers no authority upon a school district to purchase land and give a mortgage or any other security for the consideration money. In the section authorizing the inhabitants to lease, authority is given to raise a tax for that purpose. It cannot be, therefore, that the authority to lease gives the inhabitants the privilege of voting that such a contract shall be entered into as will entail a perpetual debt upon the district and put the people to the necessity of raising a tax to pay the rent every year throughout all coming time. It has heretofore been

held that the district could not purchase a site and give a mortgage for the purchase money, one-half to be paid in five years, the balance in ten years. This department has also repeatedly held that districts could not be permitted to buy a site and erect a school-house upon land incumbered by mortgage.

No good reason can be given against permitting the district to give a mortgage for the purchase money of a site, which will not bear with equal force against permitting them to enter into a *contract*, by which the site of the school may be subjected to a perpetual incumbrance. If a mortgage is given, the interest must be paid annually, and the principal within some specified time. If a perpetual lease is given, the interest of the stipulated value of the land must be paid annually, but the principal cannot be paid at all except at the option of the lessor. The fact that the principal cannot be demanded, is not a sufficient reply to the objection, for the real difficulty is that the lien and incumbrance can only be removed with the consent of persons claiming the lien.

What is this contract as contemplated in the resolution? It is just this. The lots are assumed to be worth about $487. The present owners say that the district may have an unconditional title in fee conveyed to them at any time in ten years, on the payment of that sum and the interest annually, at 7 per cent. But if the $487 is not paid within ten years, then the owners may demand $500 or a $1000, or just such sum as they may think proper.

A *mortgage* may be foreclosed, if interest and principal, or either, are not punctually paid, and the premises sold, but in that case the proceeds, after paying the debt and costs, are refunded to the mortgagor.

If rent is not punctually paid, the landlord may reënter and take possession of the premises leased, together with all the improvements, and may have judgment for costs.

If, therefore, any incumbrance upon a school-house site is allowable, a mortgage would be preferable to a perpetual lease.

The appeal is therefore sustained, and the resolution adopted by the meeting of the 27th March aforesaid is set aside and declared null and void. If the district need a new school-house, the site for it must be purchased, and a tax levied to pay for it.

Per Morgan, July 6, 1848.

In designating a site for a school-house, the description should be by metes and bounds, and the quantity of land should be stated, that every inhabitant of the district may be able to vote intelligently.

At a special meeting held in District No. 6, Lansing, March 1, 1849, resolutions were passed to change the site of the school-house "to the first corner north of the road, on a piece of land owned by Mary Dickerson;" to raise a tax to purchase the new site, and also a tax of $300 to build a school-house, &c.

The notices for this meeting having been deficient and improperly given, another special meeting was called, to be held March 15, 1849.

At this last meeting, a resolution was passed confirming the proceedings of the meeting of the 1st of March.

The principal point in the case is, that the site was not sufficiently designated.

The resolution to move the site "to the first corner north on the road," is too vague and indefinite, and cannot be regarded in law. It does not state whether the trustees are authorized to purchase one-half acre or five acres on the corner, nor is the description of the land given sufficient to give an idea of its location.

In designating a site for a school-house, the description should be by metes and bounds, and the quantity of land should be given, that every inhabitant of the district may be able to vote intelligently.

Per Morgan, April 18, 1849.

When the trustees have contracted, to locate the school-house on any particular place upon the site, in the absence of any instructions from the district, this department will not interfere.

The trustees located a school-house a few feet less than four rods from the south line of their lot which is bounded on the highway. The appellants and a majority of the district desired to leave *full four rods in front.* The trustees, however, in the absence of any explicit instructions or direction from the district, agreed upon the present location and entered into a contract with a builder who had commenced his work prior to any instructions from the district. The trustees having gone on, for aught that appears to the contrary, in good faith in the location of the house prior to any expression of the wishes of the district, and having entered into contracts and incurred liabilities in the prosecution of the work, it is deemed unwise and inexpedient to subject the district to the expense which must be incurred by a change in the location.

The appeal is dismissed.

Per A. G. Johnson, Dept. Supt., August 30, 1849.

A majority of voters at a school district meeting may empower the trustees to purchase additional territory adjoining the school-house site, for the purpose of enlarging their grounds for school purposes. It is not a case of removal of site.

The only question involved in this appeal is whether the purchase of an additional quantity of land adjoining that on which the former school-house of the district had been erected, and which was burned down, rendering it necessary for the district to build a new one, and the re-building of the district school-house wholly or in part upon the new ground thus purchased, is such an act as requires the assent of two-thirds of the voters present at a district meeting called specially for the purpose under the provisions of § 1, No. 85, of the Laws relating to common schools. I do not doubt the legal right of a majority of the voters in any district meeting duly convened, to lay a tax upon their district to purchase ground additional to and adjoining a site already owned by the

district, if such ground be suitable for the purpose of the existing site, and the school,—such as play ground for the children, wood-house or other appendages. Nor could the certificate of the town superintendent be necessary to render such an act legal any more than for building a wood-house, or repairing the school-house. The district, as I understand the case, owned no more ground than was covered by the buildings. Now what were the acts which the law intended to prohibit the mere majority from doing after a site had been purchased and a school-house built or purchased for the district while the same remained unaltered?

Certainly not to prevent the purchase of more ground immediately adjoining, if necessary, nor the erection of additional buildings thereon, if the exigencies of the district required it for the accommodation of the school, or even the erection of a new house should it be necessary.

These are acts which, in my judgment it is perfectly competent for the majority of the inhabitants of the district to perform, when assembled in a school district meeting. I cannot hold this to be such a change of site as comes within the provisions of the section above mentioned.

Per N. S. Benton, July 10, 1846.

The department will annul the certificate of a teacher for cruel and unreasonable discipline in the government of a school.

Mr. Bly was employed as a teacher in District No. 7, Amity, by the trustees, on the 4th of December last, and soon afterwards commenced his school, under a certificate of qualification, granted by the town superintendent. From the statement of the respondents, in answer to the appeal, it appears "that much dissatisfaction prevailed in the district, on account of the severe, not to say outrageous manner pursued by the teacher in punishing the scholars." And on a visitation of the school on the day above referred to by the town and county superintendents, but twenty-eight out of fifty-eight children on the teacher's list were present. "The great part of the absentees, *Bly acknowledged, had been driven from the school in consequence of his severity*, &c. He also remarked to us, that 'if he could get rid of a few more, he thought he could govern the rest.'"

The respondents further state, during the examination "the greatest confusion, insubordination and anarchy continued;" that the teacher was informed at the close, and after the children had left, in the most kind and friendly manner that some method better calculated to preserve order in his school must be adopted, and he was advised to "address his pupils in a spirit of kindness, &c.," at which he evinced great anger, announced his intention "to adopt and persist in his own course, and to receive dictation from no man." The superintendents then informed him, that in their judgment the indiscriminate use of the rod was improper, that the "insubordinate conduct of his pupils was in a measure owing to his indiscriminate and severe use not of a rod, but of a bush about three-quarters of an inch in diameter, and three

feet long, with several branches well twisted together," and that unless a reformation in this respect was promised, they should be under the necessity of depriving him of his certificate.

This he peremptorily refused to do, and distinctly informed the superintendents that he should continue the same course of discipline he had adopted for the government of his school. Under these circumstances, they deemed it their duty to annul his certificate.

The practice of inflicting corporeal punishment upon scholars, in any case whatever, observes General Dix, has no sanction but usage. The superintendent is not prepared, in the present imperfect condition of educational science, entirely to prohibit its use as a means of school discipline, but he will sustain town and county superintendents in every effort to restrict it to the smallest possible compass consistent with the preservation of order and government, and he will in no case tolerate the slightest abuse in the discretion conferred in this respect by usage, or otherwise, upon teachers.

In this case the town and county superintendents were amply justifiable in annulling the certificate, and their proceedings are therefore confirmed, and the appeal dismissed.

Per S. Young, February 1, 1844.

Every contract made with teachers in our common schools necessarily includes the condition that the agreement cannot be binding for a longer period than teachers may hold certificates of qualification, and on the annulling of their certificates all claim for future services ceases.

The appellant in the year 1845, had made a contract with the trustees of school District No. 10, in the town of Champion to teach the district school for a limited period, and at a stipulated price per month for his services; and before the expiration of the term limited by the contract, on the 27th day of November, 1845, for causes satisfactory to that officer, the town superintendent annulled the certificate of qualification, which act was affirmed by the county superintendent.

On appeal to the department, it was deemed advisable for the reasons stated in the decision then given, not to interfere with the acts of these officers, by a formal reversal of their decisions.

The appellant claimed of the trustees of the district his wages, under his contract, for the unexpired term after the annulment of his certificate, as before mentioned, and those officers or a majority of them having refused payment he appealed to the county superintendent, who declined interfering on the ground that the appellant had no legal claim to compensation under his contract from the time his license as a teacher was annulled. And from this determination, the appellant has again appealed to this department.

Every contract made by trustees with a teacher in our common schools necessarily includes the condition that the agreement cannot be binding upon them for a longer period than the teacher may hold a certificate of qualification. I do not mean by this that trustees cannot with a full knowledge of all the facts in regard to a want of license

make a contract with an unlicensed teacher which will bind them *personally*, but I do hold that this department cannot in the exercise of its rightful powers and jurisdiction be called upon to enforce a performance of any such contract.

I assume that when the trustees made the contract with the appellant for his services as a teacher, both parties understood that the appellant had a proper license, and that the contract was to cease whenever he became legally disqualified as such, but if he be able to establish a different contract by competent proof then he must resort to another tribunal, for this department cannot afford him any relief.

The decision of the county superintendent is affirmed and the appeal dismissed.

Per N. S. Benton, July 13, 1846.

A teacher employed under a contract, to teach by the month, specified as twenty-six days, is entitled to dismiss school every Saturday afternoon, or each alternate Saturday, according to the custom of the country, and the trustees have no right to withhold any portion of the amount due him for so doing.

A contract was made between Mary Dwight and Jacob Harder, one of the trustees of District No. 1, Windsor, and part in Conklin, by which she was to teach the district school at three dollars a week for an indefinite time.

The trustees dissenting on the 22d day of November, a new contract was made between said Mary Dwight and Jacob Harder, with the consent of the other trustee, Alanson Alden, by which she was to teach four months, at the rate of twelve dollars per month of twenty-six days.

The said Mary Dwight taught from November 22, 1847, to March 21, 1848, inclusive, a period of one hundred and twenty-one days, deducting Sundays. She therefore taught four months of twenty-six days, according to contract.

But it is alleged by Harder, that the said Mary agreed to teach Saturdays or lose those days. The said Mary denies this, and alleges that "Saturdays" were not mentioned when the contract was made. The affidavit of Jared N. Hoadley, confirms the allegations of said Mary Dwight. Hoadley swears that Mary Dwight agreed to teach twenty-six days for $12, on condition that she taught four months.

Hoadley's affidavit proves a contract by the month, at $12. Such a contract would authorize the teacher to dismiss her school every holiday and Saturday afternoon, or every alternate Saturday, according to the custom of the district. And the custom of dismissing school every Saturday afternoon or every alternate Saturday, is a good and wholesome one.

The amount withheld by the trustees from Mary Dwight is $3.11.

It is adjudged and decreed that said Mary is entitled to receive from said trustees said sum of $3.11, in addition to the sum of $44.89 already paid to her, and the trustees are hereby ordered to pay the same to her forthwith.

Per Morgan, June 7, 1848.

A teacher can only be employed by the trustees. Therefore a vote taken at a district meeting to *dismiss* a teacher and substitute another in her place, is illegal and void.

Samuel T. Peck and James Smith, two of the trustees of District No. 1, Livingston, hired Miss Susannah Smith to teach their winter school, to commence November 30th, 1848. Mr. Lament, the other trustee, was consulted, but did not consent to the contract.

Miss Smith commenced the school in the school-house of the district, at the stipulated time.

Mr. Lament not being satisfied with the agreement of the other trustees, hired Miss Horford to teach a school in another room.

At a special meeting held in the district, January 20th, 1849, for the purpose of voting a tax to repair the school-house, and for other purposes, a vote was taken and carried to substitute Miss Horford in the school-house, as teacher, in place of Miss Smith.

From this proceeding the two trustees appeal.

In employing teachers, the trustees should consult, as far as possible, the wishes of the inhabitants of the district. But when the trustees have contracted with a teacher, thereby binding themselves and the district, the inhabitants cannot free themselves from the obligations thus imposed by the official acts of the trustees.

Teachers can be employed only by trustees.

A contract made by two trustees, the third being consulted, is valid; but one trustee can perform no official act, without the concurrence of at least another, and a consultation with both.

In this case, Miss Smith was legally employed as the teacher for the district, and could not be dismissed except by the trustees. Therefore the proceedings of the district meeting on the 20th January, to dismiss Miss Smith and substitute Miss Horford as teacher, were illegal and void, and Miss Horford is not entitled to receive any of the public money or to continue her instruction in the district school-house. Appeal sustained.

Per Morgan, March 17, 1849.

When an inhabitant moves from one school district into another for the purpose of avoiding an enumeration of his children in the former district, and immediately after the enumeration moves back, the town superintendent should apportion the money drawn on account of his children to the former district.

In this case the appellants transferred their residence from Joint District No. 3, Cherry Creek and Ellington, where they have for several years resided, to District No. 7 in Cherry Creek, on the 30th of December last, with the obvious intention and design of having their children enumerated in the latter district, where they generally attend school, owing to some difficulties existing in District No. 3. On the 1st of January, both the appellants returned to their former residences in the latter district where they have since remained, and which is their permanent residence.

The town superintendent under these circumstances very properly refused to sanction the fraudulent attempt to evade the spirit and intent of the law, and apportioned the money drawn on account of their children to District No. 3. In this he has been sustained by the county superintendent whose decision must be affirmed.

Per S. Young, April 10, 1844.

A mortgage given to secure the purchase money of real estate, is subject to taxation in the district where the mortgagee resides.

From the statements of the county superintendent in this case it appears that on the 12th of March last, a tax was voted in District No. 8, in which the appellant resides, for the purpose of erecting a schoolhouse, which was duly assessed on the taxable inhabitants, according to law by the trustees on the 23d of the same month. At the time of voting the tax the appellant was the owner of a farm in the district, which was leased to a tenant whose term expired on the 1st of April subsequently. On or about the 18th of March intermediate the voting, and the assessment of the tax, he sold the farm to a non-resident of the district and took a mortgage for the purchase money, stipulating to give possession on the expiration of the lease, from which period interest on the amount secured to be paid by the mortgage was to commence. The principal question involved in the appeal is as to the right of the trustees to tax the appellant for the amount secured to be paid as the purchase money of the farm sold by him. The county superintendent decided that the trustees were legally authorized to include the amount in their tax list, under the head of personal property, from which decision the present appeal is brought. The rule of law in this respect, has been correctly stated by the county superintendent. It is that where a farm is sold the vendor remaining in the district is taxable for the avails of such sale as personal property, whether such avails are in the shape of money or securities for its payment, while the purchaser or his agent, whether resident or non-resident is taxable for the real estate. In the present case the farm of the appellant had been sold and a mortgage executed for the purchase money prior to the assessment of the tax previously voted; and in accordance with the principle above laid down, the appellant was clearly taxable for such purchase money as personal estate and the purchaser as the non-resident owner of the real estate. Nor can this principle be in any respect affected by the arrangement between the parties relative to the period when possession was to be taken or interest to commence running on the mortgage.

Per S. Young, December 4, 1844.

It is the duty of the trustees in laying a tax to assess the same against every person within the district who owns or is in possession of taxable property at the time of making out such tax list.

On the 3d day of February, Mr. Hoyt sold all his real estate in said district to William Moreau, and executed and delivered a deed to him.

Mr. Hoyt remains in possession and by the contract will remain in possession till April 1, 1848. February 15, 1848, the trustees of the district proceeded to make out a tax list upon a tax voted January 15, 1848, to build a school-house. They with a full knowledge of the above sale and conveyance assessed Mr. Hoyt with the farm and real estate so sold.

Mr. Hoyt claims that the land should have been assessed to Mr. Moreau.

The trustees were right. By § 85, chap. 480, Laws of 1847, the trustees are required to apportion a tax upon "all the taxable inhabitants holding property in the district, according to the valuations of the taxable property which shall be owned or possessed by them at the time of making out such list." Mr. Hoyt, at the time of making out the list, had not given up possession and must be considered the possessor.

It is to be presumed, that the purchase money is not to be paid until possession is delivered, in which case the trustees could not assess the price of the farm to Mr. Hoyt as personal property. The appeal is dismissed.

Per Morgan, March 18, 1848.

Contiguous territory lying partly in two or more districts, occupied and cultivated as one farm is taxable in the district in which the occupant resides.

The facts in this case as submitted are as follows:

Whitman was the owner and occupant of a farm in District No. 12, but recently purchased another lot of land contiguous to his farm and lying in District No. 2, and removed his residence to District No. 2.

Whitman, residing in No. 2, is taxable in No. 2, for all the land he occupies and cultivates which is composed of contiguous territory.

The farm lying in No. 12, on which he formerly resided lying contiguous to the farm upon which he now resides in No. 2, and both farms being occupied by him, is taxable in No. 2 and not in No. 12.

But the tenant of Whitman is a resident of No. 12, and must be taxed there, for the house and garden occupied by him.

Per Morgan, June 7, 1848.

Where a tax payer voluntarily moves from one district to another he is liable to a tax for building a school-house in the latter district, even if within four years he has paid a tax for that purpose in the district from which he removes.

Benjamin Mix, the petitioner, owns a farm partly situated in District No. 16, and partly in No. 10, Gouverneur, St. Lawrence county. Until last August he lived within the bounds of No. 16, but at that time he moved into district No. 10. While a resident of No. 16, he contributed his share of the expense of building a school-house in that district. This was about eight years since.

The inhabitants of No. 10, have recently raised a tax to build a new school-house and have included the farm of Mr. Mix in their tax list He wishes to be released from the payment of the tax.

This petition must be denied because the law exempts only those who have been set off from another district without their consent within four years from the payment of a tax for building a school-house.

Mr. Mix voluntarily moved from No. 16 to No. 10, and moreover upwards of four years have elapsed since he was taxed for building a school-house, so that he cannot claim exemption on either ground.

The petition is dismissed.

Per A. G. Johnson, Dept. Supt., August 7, 1848.

In levying a tax for the purchase of a school-house site, the district is not limited as to the amount to be raised.

The certificate of the town superintendent is not necessary, and the district may by a majority vote raise such an amount as shall be necessary for the purpose.

At a special meeting of the inhabitants of District No. 5, Troy, held July 20, 1848, a site for a school-house was designated and a tax of four hundred and seventy-five dollars was voted to pay for the same. The site thus designated was for the second school-house in the district.

The appellant desires that the proceedings be set aside for the following reasons:

1. Because the commissioners did not certify that a *larger sum than four hundred dollars was necessary to purchase the site.*

2. On the ground of expediency.

By sub. 8, § 62 School Laws, provision is made for designating sites for two or more school-houses in a district.

With the consent of the town superintendent (or the commissioners, as in this case) the inhabitants of a district, when legally assembled, may by a majority of votes of the legal voters present, designate a site for the second school-house in their district and may lay a tax upon the taxable property of the district to purchase such site. The limitation to four hundred dollars does not apply to such cases. The section which requires the consent of the town superintendent to raise a larger sum only applies "to building, hiring or purchasing a school-house." (See § 70, School Laws.)

The proceedings of the meeting of July 20, were legal.

As to the question of expediency this department does not feel at liberty to interfere without proof of palpable wrong, or abuse of power, which does not appear in this case.

This decision is not intended to favor the abandonment of the old site.

The appeal dismissed.

Per Morgan, September 26, 1848.

It is the duty of the trustees to expend the library money on or before the 1st day of October of the year in which it is received.

Library money can in no case be expended for teachers' wages without permission of the State Superintendent.

This is an appeal from the proceedings of a special meeting of the inhabitants of School District No. 4 in the town of Danube, Herkimer county, held December 31, 1847, pursuant to notice.

At said meeting it was

Resolved, unanimously, that the amount of library money now on hand ($9.58) be appropriated for the payment of teachers' wages for the present term.

Resolved, By a majority, by a vote of eight to four, that one-half of the school library money which will be allotted to the district the coming year, be appropriated to the winter term, and the remaining half to the summer term for the payment of teachers' wages.

The trustees ought to have expended the $9.58 of library money on or before the 1st day of October last. Not having done so, the town superintendent must withhold from their district the said sum of $9.58, and also the appropriation of library money for the coming year.

The first resolution appropriates money which the town superintendent cannot legally pay over to the trustees or their order; it is therefore nugatory.

The second resolution is null and void, for two reasons: 1st. By reason of not having expended the last year's appropriation of library money on or before October 1, 1847, the district is not entitled to any future appropriation, except with the leave of this department; 2d. Because the law of December 15, 1847, which took effect January 5, 1848, provides that library money shall not hereafter be expended for teachers' wages in any case, without the previous approbation of the State Superintendent.

Therefore the proceedings of said district are hereby annulled.

Per Morgan, January 20, 1848.

A motion put to vote by any person other than the chairman of the meeting, is irregular and void.

The inhabitants of a district have no power to dissolve or annul the district.

The first meeting in District No. 9, Lloyd, Ulster county, was held August 23, 1848, at which the following proceedings were had:

A chairman and clerk, *pro tem.*, were chosen. The officers of the district were elected, and a site for the school-house designated. During these proceedings some difficulties arose upon questions of order.

A motion was made and seconded, that the meeting declare the district to be annulled, which the chairman refused to put, when the mover called for the ayes and noes, and declared the motion to be carried.

A motion was then made to adjourn, but not being seconded the chairman refused to put it to vote.

The mover called the ayes, and declared the meeting adjourned, whereupon many withdrew.

The meeting continued its organization, and transacted business after the withdrawal of some of the inhabitants.

The appellant desires that the proceedings of the meeting held after the motion to adjourn was made, be declared void.

The motion to dissolve the district was entirely out of order, as it was upon a question over which the district had no control. A motion

to adjourn cannot be put to vote until it is seconded. The chairman was therefore correct in refusing to put to vote either of these motions.

A motion put to vote by any other person than the chairman of the meeting, is void.

The appeal is dismissed, and the proceedings of the meeting confirmed.

Per Morgan, December 22, 1848.

If the trustees of a school district refuse to levy a tax, in pursuance of chap. 214, of Laws of 1847, to pay costs of school district officers, who have sued or been sued in the discharge of their official duties, this department cannot interfere.

The proper remedy is an application to the supreme court for a mandamus.

The trustees of District No. 7, De Kalb and Canton, refuse to levy a tax of $115.73, as directed by chap. 214, Laws of 1847, to remunerate the appellants for costs and expenses incurred by them as former trustees of the district.

An appeal is taken to this department.

The superintendent is of opinion that this appeal cannot be entertained. The proper remedy of the appellants under the act referred to is by application to the supreme court for a mandamus.

Per Morgan, January 4, 1850.

A notice given by the district clerk for a meeting is legal, though the directions of the trustees to the clerk to give such notice were verbal.

A special meeting was held in District No. 5, Lisbon, St. Lawrence county, December 30, 1848, pursuant to a notice given by the clerk for the purpose, and the site of the school-house was voted to be changed.

The appellants object to the proceedings of the meeting,

Because the notices of the meeting by the district clerk were upon the verbal direction of the trustees.

If the district clerk gives the proper notices for a special meeting the proceedings of that meeting will not be held to be illegal, although the trustees may have given the clerk only a verbal direction to give the notices.

The proceedings of the meeting therefore are legal and regular.

Appeal dismissed.

Per Morgan, March 6, 1849.

The clerk of a district has no power to authorize any person to give notices for a district, or to do any other act.

The trustees of District No. 14, Lockport, called a special meeting, to be held on the 22d day of March, 1849, and directed the clerk of the district to give the proper notices.

Most of the notices were given by a son of the clerk. The meeting held in pursuance of such notice is alleged to be illegal.

It is the duty of the district clerk to give all notices for school meetings in his district, and in case of his refusal or of a vacancy in the office of clerk, a trustee may give them.

But the clerk of the district has no power to authorize any other person to give the notices or to perform any other duties of his office. The town superintendent only can, in certain cases, authorize any inhabitant of the district to give notices of special meetings.

The appeal is sustained, and the proceedings of the meeting are declared illegal and void.

Per Morgan, April 7, 1849.

When the trustees make any change in the valuation of property, differing from the valuation, as appears by the assessment roll, they should give twenty days' notice of the changes they have made to the inhabitants of the district affected thereby.

The appellant in this case represents that on or about the 2d of March last, a tax was voted for the support of schools at a special meeting called and held in District No. 1, under the provisions of the new school law; and that the trustees, in apportioning the tax thus voted, altered the valuations of the taxable property of the district from the assessment roll of the town in several instances specified by the appellant, and among others, in his own case, without giving the notices prescribed by law, in consequence of which a larger sum has been assessed to him and others than was equitable and just.

The trustees in their answer, do not deny the charge that a departure from the last assessment roll of the town, was made by them in ascertaining the valuation of the taxable property referred to, without giving the notice prescribed by law, but claim that the valuations put by them on such property were substantially correct, and in accordance with the standard adopted by the assessor.

The superintendent is of opinion that the defense thus set up by the trustees, is invalid and untenable. The law specifically requires that in all cases where the valuations of taxable property cannot be ascertained from the last assessment roll of the town, the trustees shall ascertain the same from the best means of information within their power, giving notice to all persons interested, and proceeding in the same way that town assessors are required to proceed in the first instance. Unless therefore this requisition is strictly complied with, the assessment thus made by the trustees is illegal and invalid, whatever may be the standard of valuation adopted by them, or whether such valuations are just and equitable or not.

The persons interested in such alteration were entitled to notice in the mode prescribed by law, and to an opportunity of appearing before the trustees, and claiming a reduction of their assessments as so ascertained; and they may legally avail themselves of the omission to give such notice, either to resist the collection of the tax thus illegally imposed, or to bring an appeal to this department for such redress as

may be in its power to afford. The tax list being void in part, is void throughout.

It is accordingly hereby ordered that the tax list made out by the trustees of District No. 1, in the town of Fowler, in pursuance of the vote of the special meeting held in said district be and the same is hereby set aside, and the trustees are directed, and required within thirty days from the date hereof to make out a new tax list in accordance with law, and to deliver the same with their warrant annexed, to the collector of the district for collection, refunding if required any amount heretofore illegally collected.

Per Morgan, June 4, 1850.

A resident of a district is not responsible for the tuition of a non-resident pupil who simply boards with the former, unless the trustees notify him at the commencement of the school that he will be held responsible for the tuition.

In this case the appellant represents that the trustees have charged him eighty-two cents for the tuition of Erastus Hibbard, the son of a non-resident of the district, and who was a mere boarder in his house; and he alleges in express terms, that he did not send him to the school nor engage to pay his tuition, and that he had no control or jurisdiction over him. No answer has been put in by the trustees, although a copy of the appeal duly verified was served upon one of their number on the 28th of April last. The statement of the appellant therefore must be taken to be true, and under such circumstances he cannot be regarded as legally liable for the tuition of the boy. If the trustees had designed to hold him responsible, it was their duty to have apprized him of the fact at the commencement of the term. Not having done so they must look to the father of the boy.

It is therefore ordered that the trustees strike from the rate bill the charge against the appellant for the tuition of Erastus Hibbard.

Per Morgan, May 18, 1849.

A person elected as a librarian of a school district cannot be displaced except by a direct procedure on the part of some competent legal authority, on information in the nature of "*quo warranto*," or on appeal from the election, even though the incumbent be an infant.

This was an appeal originally brought to the county superintendent of Saratoga, from the refusal of the trustees to deliver over to the charge of the appellant the library of the district, he having been chosen unanimously as librarian at the annual meeting of the district, on the first Monday in October last. In their answer to the appeal the trustees place their refusal upon the ground that the appellant is a minor and could not therefore execute a valid bond for the preservation and safe-keeping of the books belonging to the district library. The county superintendent very properly overruled this defense, holding that the appellant though ineligible must be recognized as the librarian "*de facto*" of the district so far as the public and third persons are concerned and that his right to

the office could not be tried in this indirect way. No principle of law is better settled than that the actual incumbent of an office holding under color of a legal election or appointment can be displaced only by a direct procedure on the part of some competent legal authority on information in the nature of a *quo warranto* or otherwise; and that his acts so far as the public are concerned, will be recognized as valid and legal to all intents and purposes while he continues to execute the office under claim of title. In this case the appellant was unanimously elected librarian of the district, notwithstanding his admitted ineligibility, and it does not rest with the trustees to deprive him of the office in this indirect mode. They might have appealed from such election, placing their appeal expressly upon the ground of his ineligibility, and the county superintendent might have set aside the election and ordered a new meeting to fill the vacancy. But not having resorted to this remedy, they cannot refuse to deliver over to him the library of the district on the ground of such ineligibility; nor are they warranted in assuming that the property of the district will be unsafe in his hands on the ground of his want of responsibility. They may remove him from office whenever he willfully disobeys their directions in any matter relative to the preservation of the books and appurtenances of the library or for any willful neglect of duty, &c., &c. But they cannot refuse to recognize him as the legally elected librarian of the district.

They are therefore hereby directed to deliver the library of the district into his hands, and the decision of the county superintendent is hereby affirmed.

Per Young, January 29, 1845.

It is a rule of this department, that all acts of school district officers will be regarded as regular, unless duly appealed from.

This appeal is brought from the proceedings of a special meeting held in District No. 9, Preble and Scott, August 5, 1848, for the purpose of receiving the report of Elam Dunbar, as trustee of said district, the said Dunbar having resigned his office in December, 1847.

It is immaterial whether the meeting of August 5, 1848, which received and accepted the report of Mr. Dunbar, was regular or not. His report and the complaints made against him were of acts previous to the meeting of December, 1847, at which he resigned, and at which his report should have been made and accepted.

It is a rule of this department, that all acts and proceeding of school officers will be regarded regular, unless duly appealed from. Whatever therefore may have been the neglect of duty of Mr. Dunbar, while in office, provided he has not rendered himself liable by squandering or losing moneys belonging to the district, he will be regarded as having discharged his duties faithfully.

Appeal dismissed.

Per Morgan, January 24, 1849.

Where a trustee is elected to the office of supervisor, the term of his trusteeship is in no wise affected thereby.

In October, 1846, Matthew Brown was chosen trustee of District No. 11, Bethel, for a full term of three years. In the spring of 1848, he was elected supervisor of the town. It being supposed that his office of trustee became vacant by accepting the office of supervisor, Mr. Thomas C. Horton was elected to fill the supposed vacancy in October, 1848.

The law which existed previous to the time the present law took effect, prohibited the supervisor of a town from holding the office of trustee. The present law, however, does not contain such a prohibition. The election of Mr. Brown did not therefore affect his tenure of the office of trustee. He is the legal trustee, and the election of Mr. Horton in his stead was irregular.

Per Morgan, April 10, 1849.

This department will, on proper application, direct an increased proportion of the public money to be applied to reduce the rate bill, to be made out at the close of the term, where the inhabitants or any considerable portion of them withdraw their support from a teacher duly qualified, without good cause.

The principle has been repeatedly recognized by this department, that when the inhabitants of a school district or any considerable portion of them withdraw their support from a teacher duly employed by the trustees, and suitably qualified, without any justifiable cause, leaving those who continue to send to the school, to defray the principal burden of the expense, an increased proportion of the public money, applicable to the payment of teachers' wages, will, on a proper application, be directed to be applied in diminution of such expense, on the rate bill to be made out at the close of the term. In this case several of the inhabitants withdrew their children from the school, and sent them to a private school established in the neighborhood, for no other reason, so far as appears from the testimony, than that arising from the price contracted by the trustees to be paid for the teacher's services, which was $14 per month. It is in evidence that he held a certificate of qualification in due form; that he sustained a good examination and taught a good school; and in the absence of any well founded objection to the character or qualifications of the teacher, it was incumbent upon the inhabitants to sustain the school during the term for which he was employed. Two-thirds of the children usually in attendance were withdrawn from the school, and the rate bills as to those who continued to send were exorbitantly increased, and justice and equity require that the superintendent should relieve them from this hardship.

The decision of the county superintendent, directing five-sixths of the public money to be applied to the support of the winter school, is accordingly hereby affirmed, and the appeal dismissed.

Per N. S. Benton, October 15, 1845.

Trustees in the absence of express directions from the district, may, in their discretion, apply the public money for the support of schools as they may deem proper, but when they apply more than (⅔) two-thirds thereof for the support of the winter school, the Superintendent of Public Instruction will interfere.

It seems that the trustees applied more than two-thirds of the public money for the support of the winter school in 1846, leaving the balance for the summer school. In the absence of any express direction on the part of the district, the trustees have a legal right in their discretion to apply the public money as they may deem proper, which discretion will always be controlled by the department, when those officers apply more than two-thirds of the public money to the winter schools, leaving the balance for the summer schools. The act which should have been appealed from, was the payment of nearly all the public money towards the support of the winter school in 1846. The trustees having the strict legal right to do as they have, and no legal steps having been taken to correct it (more than thirty days having elapsed before the bringing of the appeal), as a legal consequence they are bound to make out their rate bill in accordance with their former acts, that is, apply the residue of the public money to the summer school, and make out their rate bill for the balance.

Per N. S. Benton, April 8, 1847.

The public money apportioned for one year cannot be applied to the payment of teachers' wages of a previous year, except when a term embraces a portion of two years, in which case the public money of either year may be applied indiscriminately to that term.

The appellees (two of the trustees) gave an order upon the town superintendent of Hoosick for $10 to be paid out of the apportionment of public money for 1849, in favor of the teacher for the summer term of 1848. The public money apportioned for one year cannot be applied to the expenses of a previous year, except when the term embraces a portion of two years; in which case the public money of either year may be applied indiscriminately to that term.

The trustees could not legally apply any of the apportionment for 1849, to the payment of the teacher of the summer of 1848.

The appeal is sustained.

Per Morgan, April 3, 1849.

Trustees have no power to provide by the same rate bill, for the compensation of teachers for different terms of instruction.

This appeal presents the question whether the wages of the same teacher, employed for different terms, but at the same rate of compensation can be legally included in the same rate bill, treating the two periods as one term, and assessing the balance of the teacher's wages after applying a portion of the public money thereto, upon the inhabitants sending to school.

Superintendent Dix held, in a similar case, that it was wholly inadmissible to provide by the same rate bill for the compensation of two teachers for different terms of instruction. (See Common School Decisions, p. 165.) This decision is in strict accordance with the letter and spirit of the school act, and conformable to principles of equity. No rule of legal or equitable right calls for or can sanction the imposition of a tax or burthen upon any individual school district inhabitant unless he shall have voluntarily placed himself in a condition to have that burthen or tax imposed according to the express terms of the law, under which the school district officers act.

Per Morgan, July 22, 1849.

A rate bill cannot be legally made out for any other purpose than teachers' wages and for fuel.

The trustees of District No. 6, Cameron, hired a teacher in the winter of 1847–8 for three months. He taught about two months, when he discontinued his school which was not opened again during the winter. The teacher was paid twenty dollars of public money, the balance remaining unpaid. Sometime in November, 1848, the trustees made out a rate bill for the amount remaining unpaid, and included in it a tax for fuel, and also a tax for sundries, amounting to $3.00.

It is objected that the tax of $3.00 cannot legally be included in a rate bill. The objection is well taken. A rate bill can be made out for no other purpose than for teachers' wages, and for fuel. The trustees could not, therefere, legally include the tax of $3.00 in the rate bill.

Per Morgan, March 5, 1849.

An inhabitant cannot gain a residence in another district by taking a portion of his family with himself thereto, so as to send his children to school therein.

The following statement of facts is submitted by the parties:

Barclay Miller owns a farm in District No. 5, upon which he lived till the spring of 1847, when he removed to another farm in District No. 12, leaving his son in the occupancy of the farm in No. 5.

On or about the 25th of November, 1848, a district school was commenced in No. 5, to which Mr. Barclay Miller sent part of his children. Upon the representation of the teacher that the school was already too large, the trustees directed him to dismiss Mr. Miller's children from school.

Whereupon Mr. Miller came with his children and a part of his furniture to his son's house in No. 5, leaving his wife at his house in No. 12. His son went to the farm in No. 12, but left his wife at the house in No. 5. Mr. Barclay Miller has, since this arrangement, sometimes lodged at his house in No. 12, and his son has also occasionally lodged at the house in No. 5. Barclay Miller took with him to No. 5, his horses and milch cows, but had stock on both farms, and has since killed his hogs at the house in No. 12, and there packed the pork.

Under this statement of facts Barclay Miller cannot claim to be a resident of District No. 5. The trustees have power to dismiss his

children from the school, or if they permit them to attend, they are not entitled to share in the public money of the district, nor can they be lawfully enumerated, as children residing in the district. Mr. Miller is a resident of No. 12, and his children must be there enumerated.

Per Morgan, January 11, 1849.

Where the inhabitants at a district meeting direct the trustees to do an act which they are authorized by law to direct, as the removal of a school-house, the trustees may levy a tax to defray the expense, without a vote of the district.

The inhabitants of District No. 17, town of Wilna, voted a new site for the school-house, and directed the trustees to move the house by a "bee."

The trustees made a "bee," but there not being much of a "turn out" on the part of the inhabitants, they were only able to get the school-house into the highway. Foreseeing the difficulty attending the removal by such means, and not receiving the requisite aid, the trustees moved the school-house to the site selected at an expense of $25.00

A special meeting was called on the 4th December, 1847, without stating the object of it in the notices, at which a tax was voted to meet the expenses of the trustees. Only four legal voters were present at the meeting.

The vote directing the trustees to move the house by a "bee" was void, as they could have no authority over voluntary aid, and could not depend upon it as a means of moving the school-house.

When the inhabitants of a district direct the trustees to perform a work where expenses are to be incurred, the trustees are authorized to raise the amount thereof, by tax, without a vote of the district. In this case the trustees would necessarily incur an expense in moving the school-house, which is chargeable to the district and can be collected by tax the same as if it were voted. (School Laws, No. 134.) And although the vote of December 4, 1847, to raise the tax was illegal on account of the want of proper notice, the levying of the tax was legal on the ground that the trustees possessed the requisite power, without a vote of the district to raise the tax.

The appeal is dismissed.

Per A. G. Johnson, Dept. Supt., August 3, 1848.

In the alteration or formation of school districts, out of territory lying in two or more towns, the order making the same must show that the town superintendents of the respective towns united in making the order.

It appears from the papers transmitted to the department in this case by the county superintendent, that the order for the transfer of Mr. Safford from Joint District, No. 6, in Essex and Westport, to District No. 8, of the former town, was made by the town superintendent of Essex alone, without the presence and concurrence of the superintendent of Westport.

It is true that it is alleged by the superintendent of Essex, in his answer to the appeal, that the alteration was made with the "concurrence of the town superintendent of Westport," but the order, a copy of which is appended to the appeal, purports to be made by the superintendent of Essex alone, and no reference whatever is made to the superintendent of Westport, and by the uniform decisions of the department, no alteration of a district can be legally made, except by the action of a joint board, consisting of the requisite authority of the several towns, from parts of which such joint district is composed. Neither the previous nor subsequent concurrence, formally or informally, of the representatives of either town to such alteration, can supply the defect arising from their absence at the time of making the order. They must meet and constitute a board, otherwise the proceedings are void.

This objection appearing in this case upon the papers, must be regarded as fatal to the validity of the order appealed from, and the decision of the county superintendent must be reversed.

Per S. Young, August 6, 1844.

When a trustee is absent from a district, so as to be unable to act with his associates, the town superintendent, on the application of the other trustees, will appoint a successor.

Some time in the month of September last, Mr. Gilbert, who had been elected a trustee of District No. 9, visited the western part of the state, in company with his wife, whose parents resided there, for the benefit of her health. Leaving her, he returned, harvested his crops, and early in October again left, with the avowed intention of remaining until the ensuing spring. The other two trustees being unable to agree in the management of the affairs of the district, and the employment of a teacher for the winter term, applied to the town superintendent to fill the vacancy which they supposed to exist in the district, in order to enable them to organize the winter school.

For all practical purposes, it is evident that a proper case for the action of the town superintendent was presented; Mr. Gilbert indeed may not have lost his legal rights as a resident of the district, but he had, at all events, ceased to be an inhabitant, and had expressly avowed his intention not to return to the district until the ensuing spring.

The department is disposed to coincide with the county superintendent in the opinion that an actual vacancy existed, created, if not by "removal from the district," in the legal acceptation of the term, by a virtual "refusal to serve," or incapacity to act, and that the interposition of the town superintendent, by the appointment of a trustee in his place, was legal.

Per S. Young, December 26, 1846.

Where trustees have employed a teacher for a certain period, and before the expiration thereof, they agree with him to continue for a month longer, the inhabitants sending to the school during the original term are not liable for any portion of the teacher's wages for the additional month, unless they send to the school during that time.

In such case the trustees should make out separate rate bills.

The facts in this case are substantially as follows: The trustees hired a teacher for the term of four months at a specified compensation. Subsequently and prior to the expiration of the term, they contracted with the teacher to continue in the school for an additional month; contrary, however, to the expressed wishes of a large majority of the inhabitants of the district and patrons of the school. Of twenty individuals who had sent during the term of four months, only eight continued to send during the additional month.

In making out their rate bill, the trustees, after deducting the public money applicable to the term, charged the aggregate balance due the teacher for the whole five months upon all the inhabitants who had sent to the school during any portion of that time, in proportion to the number of days and the number of children sent. The appellants being of the opinion that those who had not sent, during the last month ought not to pay any portion of the wages of the teacher accruing in that month, and that two separate rate bills should be made out, the one for the original term of four months and the other for the supplementary term, brought the case before the county superintendent, who held that one rate bill only was necessary for the whole five months; that the second contract was a mere extension or prolongation of the first; and that the trustees being legally competent so to extend or modify the original contract with the assent of the teacher, the entire term must be regarded as one and indivisible. From this decision an appeal has been taken to this department.

In the opinion of the present superintendent, the view thus taken of the effect of the agreement, made with the teacher by the trustees, is erroneous, so far at least as the rights of the inhabitants interested in the rate bill are concerned; as between trustees and teacher the transaction may perhaps admit of the construction contended for by the county superintendent. But the inhabitants of the district sending to school, had, it seems to me, a clear right to regard the original term for which the teacher was hired, as closed at the expiration of four months, and to insist upon the rate bills being made out for that term, reserving to themselves the option of continuing to send to school for the additional month or not. They signified their wishes to this effect to the trustees, prior to the expiration of the four months. If it is in the power of trustees so to enlarge or prolong a contract made for a specified term, to extend the liability of the inhabitants sending to school, and that against the express wishes of the district, where is the limitation of this power? The contract to hire for the additional month, must, as between the parties to this appeal, be regarded as a

new and independent contract, and the trustees are hereby directed to make out their rate bill accordingly.

Per N. S. Benton, March 13, 1845.

When a trustee is unable to discharge his duty as such trustee, by reason of imprisonment, the town superintendent may appoint his successor after the expiration of thirty days from the time of such imprisonment.

The facts of this case appear to be as follows:

Some three or four months previous to the annual meeting for the choice of district officers, one of the trustees for District No. 2, of the town of Evans, county of Erie, was arrested on execution, and committed to the jail limits of the county, where he has since been and still is confined.

At the annual meeting of the district, a motion was made to elect a trustee in the place of the individual thus imprisoned, but the majority, thinking there was no vacancy to be filled, refused to elect, and subsequently the town superintendent appointed Chauncey Stone, a trustee, in the place of Enos Avery, the former incumbent.

An appeal was taken to the county superintendent of Erie county, who reversed the action of the town superintendent, and annulled the appointment.

Section 71, of Common School Laws, published in 1844, authorizes the town superintendent to appoint any person residing in the district, to supply any vacancy occasioned by the death of the incumbent, refusal to serve, removal out of the district or incapacity of any officer, when the vacancy shall not have been filled by a district meeting within one month after the same shall occur; and the only question now presented is, had either of these contingencies happened one month previous to the time the appointment was made?

It would not, I think, do to hold that no other than a legal incapacity should operate to create a vacancy, nor will it do to say that a refusal to serve may not be as strongly inferred from the acts of an incumbent as by a direct assertion that he will not discharge the duties of his office.

Mr. Avery, no doubt, is an inhabitant of the district in every legal sense, yet in point of fact he is actually incapacitated from the discharge of his duties as trustee, by reason of his confinement upon the jail limits out of his town and out of the boundaries of his district.

The decision of the county superintendent is therefore reversed, and that of the town superintendent affirmed.

Per N. S. Benton, October 8, 1846.

Taxation of a person having the naked possession of land without color of title. A previous case commented on and explained.

On the first day of April last, Mr. Davis executed and delivered a deed of his farm to Mr. Frost, the owner of the adjoining land, receiving from him a payment of $900, in cash and the promissory notes of third persons, and a mortgage for the residue of the purchase money. On the 12th day of April, the trustees made out a tax list, and, as Mr. Davis still continued in possession of the farm he had sold, assessed him for the value thereof. Upon his objecting, and stating to the trustees that he was in possession only at sufferance, while waiting for the opening of lake navigation to transport his family and effects to Wisconsin, the trustees proposed to assess him for the price of the farm as personal property. To this he replied that he had already made a contract for the purchase of a farm in Wisconsin, and bound himself to pay a larger sum than that for which he had sold his farm, and offered to make an affidavit that his debts exceeded the value of his personal property. The trustees being satisfied of the truth of his statement, but supposing themselves bound to assess him for the farm by a decision of the superintendent (for which see pp. 39, 40, *ante*), united with Mr. Davis in submitting the facts for a decision.

The trustees have been misled by overlooking the distinction between the present case and that to which they refer. In the former case, Mr. Hoyt reserved the *right* of possession for a definite period, and was the actual owner, with all the responsibilities of ownership, until that period arrived. In this case, Mr. Davis, though actually in possession, is without any claim of title to possession for an hour. Mr. Frost is the admitted owner, though he has not exercised his extreme right by inhospitably turning his neighbor out of doors. As such owner he is liable to be taxed for the real estate purchased.

The facts conceded in respect to the indebtedness of Mr. Davis are a conclusive answer to any supposed obligation on the part of the trustees to assess him for personal estate, though the fact that he is about to remove, and can receive no benefit from the tax, has no legal importance in the question.

Per A. G. Johnson, Dep. Supt., May, 1849.

A tax may be voted, levied and collected in a school district to purchase a site and school-house, but the money cannot be applied until a valid title is obtained.

The appellants in this case seek to set aside the proceedings of a special meeting held in District No. 9, on the 29th of November last, at which resolutions were adopted for the purchase of a new site and house, upon the ground that a valid legal title cannot be obtained to such site and house. They allege that the house was built by private subscription, and is now owned by various persons in and out of the district, some of whom will not consent to transfer their right to the district. This allegation, vague and general as it is, is explicitly met and denied by the trustees, who assert that they can procure a good

title. This question of title, however, is one which cannot come up at this stage of the proceedings. The tax voted may legally be levied and collected, but cannot be *applied* until a valid legal title is obtained.

From the proofs before him, the superintendent entertains no doubt of the sufficiency of the title, and so much of the appeal as relates to this portion of the proceedings of the meeting is therefore dismissed.

Per Morgan, January 18, 1851.

When a tax list has been made out, but not delivered to the collector, it is no objection to the trustees calling another meeting of the inhabitants to reconsider the proceedings of the meeting at which the tax was voted, if requested by a respectable number of the inhabitants.

In this case, the appellants seek to set aside the proceedings of a special meeting, held on the 20th of February last, at which a previous vote of the district relative to the length of time during which a school should be taught, was reconsidered, and a less period adopted. Under the preceding vote, the tax list had been made out by the trustees, but the warrant had not been delivered to the collector. The superintendent is of opinion, that under such circumstances it was legally competent to the inhabitants to reconsider the previous vote.

Per Morgan, April 23, 1850.

Trustees have no power to set aside or invalidate the proceedings of a district meeting upon the assumption that they were illegal.

Though illegal votes are cast at such meeting the trustees cannot set aside the proceedings. The remedy is by appeal.

On the 1st day of October last, at an adjourned meeting of the taxable inhabitants of District No. 2, in Belmont, held for the purpose of locating a site for the school-house, a site was fixed on the land of Winkley and Smith, and the sum of $200.00 voted to build a school-house thereon. A confirmation and renewal of the vote fixing the site was had on the 30th of November last, at a special meeting of the district, more fully attended by the inhabitants, but no tax was voted for building the school-house. On the 14th of December a vote was adopted locating the site on lands of E. Stanton, Jr., and the sum of $200.00 directed to be raised for building. On the 11th of January last, the site was again changed to the lands of Winkley and Smith, and the same amount voted to be raised for building the school-house thereon. Notwithstanding this last and final vote of the district, and in the absence of any appeal from the proceedings, the trustees have determined to apply the tax voted to build a house on Mr. Stanton's land, on the allegation that an illegal vote was received at the last meeting by means of which the vote was invalidated and the preceding vote remained in force, and from this determination of the trustees the present appeal is taken.

If any of the proceedings of the meeting held on the 11th of January were illegal the appropriate remedy of the trustees or of any persons aggrieved was by appeal to this department. It is not within their

power to set aside or invalidate those proceedings on their mere assumption of such illegality. The money directed to be raised at that meeting, in the absence of any appeal within the time and in the mode prescribed by law, must be applied according to the vote then taken, and any other application of it will be illegal and invalid and will subject the trustees to personal responsibility to the district for the amount so expended, and to the forfeitures and penalties prescribed by law.

The allegation, moreover, of the trustees that an illegal vote was cast at the meeting referred to by which the result was changed, is wholly unsupported by the facts, as they appear from the papers.

The proceedings of the meeting of the 11th of January, are therefore hereby confirmed and the trustees directed to apply the tax voted accordingly.

Per Morgan, February 11, 1850.

The town superintendent of the town in which the school-house of a joint district is located, must grant the certificate of qualification to the teacher who teaches therein.

This is an appeal from the action of the trustees of Joint District No. 9, Preble and Scott, Cortland county, in hiring Albert R. Ingraham as a teacher in said district.

The facts in this case show that the said Ingraham applied to Abraham Woodard, town superintendent of Preble, in which town the school-house is situated, for a license to teach, and was rejected for want of the requisite qualifications. He afterwards applied to the superintendent of the town of Scott, and from him obtained a certificate to teach.

This was illegal. The town superintendent of the town of Preble, in which the school-house was located, could alone grant the certificate.

Per Morgan, January, 1848.

Trustees should not admit non-resident children into their school contrary to the instructions of the inhabitants in district meeting assembled.

Quære: Does not § 1, chap. 151, Laws of 1851, vest an exclusive discretion in the trustees?

This is an appeal from the decision of the county superintendent of common schools, sustaining the decision of the trustees in admitting children of non-resident parents into their district school, contrary to the instructions of the inhabitants of said district at their annual meeting.

As a general principle it is the duty of trustees to carry into effect the instructions of the district in reference to those matters over which they are allowed by law to exercise a discretionary control. Had the vote of the inhabitants in this case been a full and fair expression of the wishes of the district in reference to the admission of non-resident children, the superintendent would have deemed it his duty to carry the resolution into effect, however ill-judged such a vote might be

regarded under the circumstances of the case; but it is evident from the testimony on the part of the respondents, that this vote was improperly and unfairly obtained—that it does not represent the wishes or views of a majority of the inhabitants, but on the other hand, that a decided preponderance against such a proposition has been distinctly manifested on the part of those inhabitants of the district most interested in sustaining the school. It does not appear that the admission of these children in any respect injures the school or embarrasses its operations; on the contrary, the trustees are enabled by such accession to sustain teachers of a higher order of qualification, than would otherwise be in their power. However, the public money of the district into which these children are admitted, cannot be appropriated in diminution of the charge for their tuition.

Per Young, August, 1843.

The Department of Public Instruction, in the formation and alteration of school districts, acts upon one uniform rule, never (except in certain special cases and for the most urgent reasons) to permit new districts to be formed with a less number of children between the ages of five and sixteen years, than from thirty-five to forty, and never to countenance or sanction changes or alterations of districts which shall reduce the number of school children in a district below what has been found from practical experience, would afford an average attendance sufficient to give full employment to a competent teacher.

Per N. S. Benton, June 30, 1847.

The Superintendent of Public Instruction will reverse an order of a town superintendent annexing one district to another, where the inhabitants of either are opposed to the union, and have sufficient means for the support of a school, it being an abuse of his discretion.

This is an appeal from an order of the county superintendent of Greene county, who confirmed the proceedings of a town superintendent of the 28th June last, uniting Districts No. 2 and 19, of the town of Catskill. The county superintendent sustained the order of the town superintendent and dismissed the appeal. From this decision this appeal is brought.

From a careful examination of the papers in the case, the superintendent is compelled to differ in opinion with the county superintendent and town board, by whose order the union of Districts No. 2 and 19 has been effected. It appears that sufficient importance has not been given to the facts that the inhabitants of District No. 2 almost unanimously remonstrated against the proposed union; that they have every necessary facility within themselves, as at present organized, to sustain a good school; that for several years past they have done so, and that they do not need any accession of territory, taxable property or inhabitants; that district No. 19, so far as wealth and children of the proper age to attend school are concerned, is far more able to keep up an efficient organization than District No. 2; and that the failure of the inhabitants

in District 19, under such circumstances, even to procure a school house, so far from entitling them to special consideration, ought upon every principle, to operate adversely to their claim. Doubtless the union of two districts contiguously situated, and together occupying a small area, would prove mutually advantageous, provided such union could be effected by the general consent and coöperation of the inhabitants interested. But in the absence of such consent, and especially in the face of a determined and unanimous opposition, to such an arrangement on the part of one of the districts proposed to be united, a consolidation could, in the judgment of the department, only prove detrimental to the cause of education, and subversive of the best interests of all concerned. No good reason can be perceived why the inhabitants of District No. 19 should not promptly avail themselves of the ample means at their command, to organize and efficiently sustain a school of the highest grade of excellence. instead of permitting their territory to be parcelled out into private and select schools. They do not need the aid of District No. 2, in order to the accomplishment of this object. The decision of the county superintendent is hereby reversed.

Per Young, August, 1843.

It is the settled policy of the Department of Public Instruction, to favor the consolidation of weak and inefficient districts.

The town superintendent of Independence, Allegany county, had consolidated two weak and inefficient districts, Nos. 7 and 11. Upon an appeal to the county superintendent, he reversed the order of the town superintendent, upon the sole ground that it was, apparently, the only means of putting an end to the quarrels and dissensions that had unhappily arisen in the consolidated district. The county superintendent at the same time admitted that the organization, as made by the town superintendent, was "the most judicious one that could be entered into under existing circumstances," and that although not perfect, "it was the best that could be made until the population of the neighborhood becomes more dense."

The State Superintendent reversed the decision of the county superintendent, and confirmed the order of the town superintendent, strongly reprehending the bad policy of reëstablishing two weak and inefficient districts, obviously incapable of maintaining an adequate organization.

Per Young, December 20, 1844.

The superintendent has power to remove a trustee from office, for corruption or intentional neglect of official duties, or for willful disobedience of the orders of the department.

On the 20th of December last, the trustees in District No. 6, in the town of Somers, were directed and required by an order of this department, within ten days from the service upon them of such order, to execute a certain tax list and warrant, made out by Jacob G. Purdy, one of the trustees, for the collection of the amount voted at a

special meeting held in said district on the 27th of September last, for building a school-house and out buildings, and fencing the site, deducting therefrom the sum of $8.50, the balance remaining in the hands of said trustees, on the sale of the house belonging to said district.

A copy of this order was served upon the two trustees who refused to sign the tax list and warrant on the 25th of December. On the 2d day of January, the trustees met by previous appointment. The tax list was produced, and the $8.50 above named deducted therefrom, when the two trustees for the first time interposed an objection, that a certain piece of land was included in the tax list which was not taxable in the district, and insisted upon its deduction, although no legal claim to that effect had been made by the owner or occupant of the land within the time prescribed by law. On the ensuing day, the trustees had another meeting, but Carpenter and Ferris still declined, on various pretenses, signing the tax list, and have, up to the present period, refused or neglected to carry into effect the order of the department.

This refusal is sought to be justified by them upon several grounds, among which the most important are that Purdy refused to make the necessary correction of the tax list, and also to account to his colleagues for certain pecuniary transactions of the district. Neither of these excuses can be received. If there were any error in the tax list, as presented to them for signature, it was clearly within their power as the majority of the trustees, to have made the requisite correction in the mode prescribed by law. Whatever may have been the conduct of Mr. Purdy, it constituted no sufficient grounds for a refusal on their part to comply with an express order of this department. They have manifested a determination to resist the explicit direction of the superintendent in the premises, and to evade the performance of their duties as trustees. In pursuance, therefore, of the authority vested in me by chap. 382, § 15 of the Laws of 1849, I do hereby remove the said Carpenter and Ferris from office as trustees of District No. 6 in the town of Somers.

Per Morgan, January 28, 1851.

When the inhabitants of a school district at their annual meeting, elect trustees, their proceedings will be held legal, although, such election is made by a small minority of the inhabitants.

This is in substance an appeal from the refusal of the trustees of District No. 11, to grant an order upon the town superintendent for a portion of the public money belonging to the district, applicable to the payment of teachers' wages in favor of a duly qualified teacher employed by the appellants while acting as trustees under color of a legal election by the district, and who taught in the school-house of the district. The annual meeting at which both sets of trustees were chosen was notified to be held on the 2d of October, 1843, at 6 o'clock, P. M., at which hour five inhabitants only were in attendance. They, however, organized and elected district officers, in accordance with law. After their adjournment, but before leaving the house, the residue of the inhabitants came in and insisted upon a re-organization which was accordingly had, without the

participation, however, of the inhabitants first assembled, and the appellants were elected trustees. The county superintendent having been consulted, gave his opinion that the latter election was legal and valid; and in accordance with this opinion the appellants proceeded to employ a teacher and take upon themselves the discharge of their official duties without opposition. The persons first elected, however, without questioning or controverting the right of the appellants to the use of the district school-house and the control of the district property generally, employed a teacher who taught under their direction and in accordance with a vote of the inhabitants first assembled, in a private house, in a part of the district remote from the school-house. After the termination of both schools the question of the legality of the election of the officiating trustees was submitted to this department, and the persons first elected declared to be the only legal trustees. They accordingly took possession of the books, papers and other property of the district, gave an order for a portion of the public money in the hands of the town superintendent in favor of the teacher employed by them, and who was duly qualified, and refused to recognize the teacher employed by the appellants. From this refusal to recognize the teacher employed by the appellants, the present appeal was brought.

The county superintendent, conceiving himself bound by the prior decision of the department declaring the first election valid, felt it his duty to dismiss the appeal and refer the rights of the parties to the department.

Although there can be no doubt of the validity and legality of the first election, yet the official acts of the persons subsequently chosen, under color of a legal election, and who took upon themselves the office of trustees, will be recognized and protected for all practical purposes as trustees, until the decision of the department declaring their election illegal, was obtained. Their employment of a teacher prior to such a decision, was therefore an official act, and inasmuch as the teacher contemporaneously employed by the legal trustees has been paid, and there still remains a balance of public money applicable to the payment of teachers' wages in the hands of the town superintendent, it is the duty of the trustees, and they are hereby directed to draw an order for such balance on the town superintendent, in favor of the teacher so employed by the appellants, while acting as trustees under claim of a legal election, and to make out a rate bill and warrant in the mode prescribed by law for the residue of his wages, against the inhabitants who sent to school. By this disposition of the case, it is conceived substantial justice will be done to all parties, and the rights of none infringed. It is the misfortune of the appellants that they were not more punctual in their attendance upon the annual meeting of the district.

Per S. Young, October 7, 1844.

The illegality or irregularity of the election of trustees, is no excuse for a town superintendent for refusing to pay over the public money, upon the order of such trustees. He must be governed by the report of these officers, made in conformity to law.

The town superintendent of the town of Spencer, Tioga county, declined to pay over, on the order of the trustees of District 3, in said town, in favor of a duly qualified teacher, a portion of the school moneys apportioned to said district, and from this act the trustees appealed to the county superintendent, who sustained the appeal, and ordered the town superintendent to pay the money over, for the purposes and in the manner prescribed by law. Town superintendents will not be permitted to inquire, as in this case, on being presented with a written order, signed by the trustees of a district, into the validity of the appointment or election of the persons claiming to act, and who are acting as such officers. Such an order, duly receipted by the person in whose favor it may have been drawn, would be a perfect protection to him. It is not pretended that this money is withheld for any defect in the last annual report, or that schools have not been taught in conformity with the requirements of law. As a general principle, collateral matters cannot be drawn in question, involving judicial cognizance, by any officer, when called upon to discharge a mere ministerial duty. And the town superintendent in this case assumes to decide who *are not* the trustees of the district, a matter entirely beyond his jurisdiction. The decision of the county superintendent, therefore, ordering him to pay over the money to the trustees as aforesaid, was correct, and is hereby affirmed.

Per N. S. Benton, January 29, 1846.

Neither the Department of Public Instruction, nor the moderator of a school district meeting, has any right, under the statute, to prohibit any male person who makes the declaration required by law, from voting; but it will be the duty of this department to correct and set aside all proceedings consummated or carried by votes clearly illegal, the result depending upon them. It is the duty of the person acting as chairman or moderator of a district meeting, to permit any person challenged to make the declaration required by statute, and any refusal to perform this duty, will be good ground for setting aside the proceedings of a school district meeting.

Per N. S. Benton, July 12, 1847.

A stove and pipe are necessary appendages to a school-house, and proper objects for the levying of a district tax.

At a district school meeting, held in the town of Rodman, on the 20th day of November last, a vote was taken and a resolution passed to levy a tax upon a district to purchase a stove and pipe for the use of the school-house in the district.

The appellants claim that the district has no authority to levy a tax for such a purpose. In the opinion of the superintendent a stove and pipe are necessary appendages to a school-house and legitimate objects for the levy of a district tax. The proceedings of the meeting in voting the tax aforesaid are hereby affirmed.

Per N. S. Benton, December 31, 1847.

A district may purchase a site by a majority vote. It is different from *changing* a site.

This is a case in relation to the proceedings of a school district meeting in the town of Royalton. The district, it seems, has never been the legal owner of a site; it undoubtedly has a right to procure one by a majority of the votes at a district meeting, and without the formalities required in case of a change of site.

I see no objection to the mode adopted by the district in the purchase of the land. A deed should, however, be obtained by the district, previous to the expenditure of any money on the house, so that the title may be secure.

Per Dix, November 5, 1838.

Persons who are by their profession dedicated to the service of God and the cure of souls, and having a license to preach, or who have complied with the form and mode of ordination, are ministers of the gospel within the law.

This is a case arising in a school district in Philadelphia, Jefferson county, where the trustees doubted the right of a person claiming to be a clergyman, to be exempt from taxation.

The intention of the law relating to the taxation of property belonging to ministers of the gospel, must be considered as applicable only to those who are by their profession dedicated to the service of God and the cure of souls. In a church where a license to preach is required, or where a form of ordination is necessary the license should be obtained or the form complied with in order to entitle an individual to exemption under the law. I am of opinion that a license limited in point of time, is sufficient to entitle the individual holding it, to an exemption for the time during which it continues.

Per Dix, June 11, 1838.

Town superintendents can pay over public money only upon the written order of the trustees or a majority of them, to the teacher entitled to receive the same.

Per Morgan, May 29, 1851.

The State Superintendent will, on proper application, remove a trustee for unwarrantable neglect of official duty.

Elisha Bedell, one of the trustees of school District No. 1, in the town of Hempstead, is charged with a willful disturbance and interruption of the school taught by Mary Augusta Brown, in said district. Mr. Van

Cott, another of the trustees, is charged with a refusal to unite with one of his colleagues in prosecuting for such offense, in accordance with the statute.

It is in evidence that Mr. Bedell went to the school room, and in the presence of the scholars used angry and abusive language to the teacher, openly countermanded her orders in conducting the school, and caused the school to be thrown into disorder, and that both teacher and pupils were much frightened by his language and threatening manner, and for some time after she was unable to proceed with the school.

The evidence is confirmed by the report of a committee of ten appointed by the inhabitants of the district, at the annual meeting to visit and examine the school, who, in concluding their statement, observe that they "were compelled to the opinion that Mr. Bedell has thereby disqualified himself for the office of trustee, and that it is evidently for the welfare of the school that he should forthwith resign his office."

This array of evidence is met only by a general and unsatisfactory denial by Mr. Bedell.

There can be no doubt, in the opinion of the superintendent, from evidence, that Mr. Bedell has been guilty of a gross and unjustifiable violation of law and neglect of official duty. The same conduct in an individual not officially connected with the school, would unquestionably have incurred the penalty prescribed by law; and it certainly does not mitigate the offense or change its nature, that it was committed by an officer specially charged with the preservation of quiet and order in the school, and with the protection and guardianship of its interests.

The act of 1845, to prevent disturbances in schools, above referred to, makes it the special duty of the trustees of any school district in which any such offense shall be committed, to prosecute such offender, before any officer having cognizance of such offense. Mr. Van Cott, one of the two remaining trustees, having been called upon for the performance of this duty, positively refused to comply with said request, and still refuses so to do. This is clearly an unwarrantable neglect of official duty, for which no defense is interposed; and the said Elisha Bedell and Nicholas Van Cott are hereby removed from office as trustees of said district.

Per Morgan, July, 1851.

Notice of the object of an annual meeting is not required by law. Every inhabitant is presumed to know that *any* business affecting the interest of the district may be transacted without special notice thereof.

This is an appeal from the proceedings of the annual meeting of a district held October 7, 1851.

At an adjourned annual meeting, held in the district April 7th, 1851, a resolution was passed to change the site of the school-house, and the necessary taxes were voted to purchase the site and to move the school-house. The proceedings of this meeting are presumed to have been legal.

On the 7th of October, 1851, the annual meeting was held. The customary notices for an annual meeting were posted in the district but no particular business was specified except that officers would be elected.

At this meeting a resolution was passed reconsidering and rescinding the proceedings of April 7th, 1851, so far as related to the change of site for the school-house and the raising of taxes to defray the expenses of the same.

It is alleged that special notice should have been given of the intention to reconsider the proceedings of the meeting of April 7th to make the proceedings binding.

This department has always maintained the rule, and the law prescribes that the object for which a *special meeting* of a district is called, shall be specified in the notice of such meeting. But an annual meeting is always an *adjourned* meeting. It is not necessary to give special notices, as every inhabitant of the district is presumed to know when it will be held, and also that any business which may properly come before any district meeting, may be transacted at this. It is *the* meeting of the district, and every inhabitant is bound to be present to promote the interests of the district as well as to protect his own rights.

The whole business of the meeting of April 7th, was subject to review and it was competent to reconsider and rescind the whole or any part thereof except so far as the trustees had carried out the vote of the first meeting, or incurred debts or responsibilities under it.

Per Morgan, December 30, 1851.

Whenever the inhabitants of a school district are misled by the erroneous advice of the town superintendent, and their rights become jeopardized thereby, this department will interpose for their relief, it being a case of surprise.

This is an appeal from the proceedings of an annual meeting in a district on the 6th day of October last, in voting to change the site of the school-house, and to levy a tax to purchase a new site and build a school-house thereon.

The appellants ask that the proceedings of said meeting may be set aside so far as they relate to their votes, on the ground that they did not suppose that resolutions upon these subjects could be passed at an annual meeting, and therefore they were not present at the meeting above referred to. Annexed to the appeal are the affidavits of several taxable inhabitants of the district stating that they were informed by the town superintendent, that the site of the school-house could not be changed except at a special meeting duly called for that purpose. It appears that quite a large number of the inhabitants of the district who were desirous of being present, whenever the resolution to change the site of the school-house was to be acted upon, believed this information to be correct, and therefore did not attend the annual meeting. That such information was given by the town superintendent is in fact conceded by him in a letter to this department, although he states that soon after his conversation with the appellants he found upon examining the statute, that the opinion which he had expressed was incorrect.

Inasmuch as the appellants have been misled by his information and advice, it appears to me that such a case of surprise is made out, as calls for relief from this department.

The prayer of the appellants is granted.

Per H. S. Randall, March 25, 1852.

It is not necessary that a majority of all the taxable inhabitants should be obtained, in addition to the consent of the town superintendent, in order to change the site, but only a majority of those present, and voting at a meeting duly notified.

This is an appeal from the proceedings of a special meeting held in said district on the 18th day of October, 1851.

At this meeting, it appears that resolutions were passed changing the site of the school-house, and authorizing the collection of $10.00 by tax, for purchasing a new site, and $175.00 for building a new school-house thereon. The appellant alleges that these resolutions were not passed in the manner required by law, and that the town superintendent never legally gave his consent to the proposed change of site.

The appeal papers concede that the resolution to change the site, was passed by a vote of a majority of all the taxable inhabitants of the district who were present and voted at the meeting. Therefore, if the consent of the town superintendent was given in accordance with law, the resolution to change the site was passed by the required legal majority of the inhabitants. For it is not necessary, that in addition to the consent of the town superintendent, a majority of all the taxable inhabitants *residing in the district* should be obtained, in order to change the site, but only a majority of those *present* and *voting* at a meeting duly notified.

It appears by the answer that the town superintendent did give his consent in writing, to the proposed change, on condition that the requisite majority of the inhabitants of the district should be in favor of the change. This consent became absolute the moment the condition was complied with. The requisite was obtained upon the passage of the resolutions.

Appeal dismissed.

Per H. S. Randall, March 25, 1852.

Where a town superintendent decides that a vacancy exists in the office of trustee, he should wait one month after announcing his decision, before assuming to fill the vacancy.

This is an appeal from a decision and order of the town superintendent of Beekmantown, on the 22d day of November last, deciding that there were two vacancies in the office of trustee in said district and appointing two persons to fill such vacancies.

From a careful examination of the papers, I am satisfied that the town superintendent was correct in deciding that the vacancies existed; but the district being a joint one lying partly in two different towns, it required the action of the town superintendents of both towns to fill

the vacancies by appointment. The appointments which were made were therefore void, although the town superintendent in proceeding to fill the vacancies may have acted in perfect good faith.

But even if he had the right to fill the vacancy, I am of opinion that he should have waited one month after announcing his decision, that the office was vacant, in order that the inhabitants might have an opportunity to supply the vacancies if they desired to do so.

Therefore it is hereby declared that the appointments so as aforesaid made, were and are irregular and void, and the clerk of said district is hereby ordered, within ten days after he receives this order, to call a special meeting for the purpose of filling the vacancies which exist in the office of trustee in said district, &c.

Per H. S. Randall, March 26, 1852.

Where a building committee in concert with the trustees are invested with discretionary power by resolution of a district and have entered upon the execution of their trust, by making contracts for materials, &c., the district cannot control or interfere with their plans.

This is an appeal from the proceedings of a building committee appointed to take charge of building a new school-house, and from the refusal of the trustees to call a special meeting for the purpose of comparing drafts and models of architecture and adopting the best plan, for building a school-house, wood-house and other fixtures belonging to the same.

In reply to the appeal the trustees and building committee, allege that on or about the 8th day of March last, at a special meeting called for the purpose, the district voted to build a new brick school-house 20 by 25½ feet; that Benjamin Wright and others, then submitted their plans or drafts for building said house which were voted down by the meeting. A vote was then passed giving the trustees and building committee discretionary power in regard to building and furnishing said house in the best and cheapest manner according to the size above mentioned.

They further allege that in pursuance of such vote, they went on and purchased brick and materials and entered into a contract, for laying the brick and stone, and lathing and plastering the interior of the building, and procured window frames and doors and sash with glass set, and that the walls of the house were now up and the roof nearly completed.

Under such circumstances, the superintendent is of the opinion that it is now too late to interfere with the proceedings of the building committee. The district might have restricted their powers by a vote for that purpose, when they were appointed, but having failed to do so, and having vested them with a discretion in the discharge of their duties, there is nothing in the case which calls for the interposition of this department.

Per H. S. Randall, May 19, 1852.

Who are legal voters at district meetings, and what vote necessary to raise tax by installments.

The qualification of voters in school district meetings, is defined in § 59, chap. 480, Laws of 1847. (No. 84, School Laws and Forms for 1848.)

Every person, to be a voter in a school district meeting must, therefore, be a male twenty-one years of age, and a resident of the district. Any person having these three qualifications, and "*entitled to hold lands in this state, who owns or hires real property in such district, subject to taxation for school purposes*," is a voter.

This clause authorizes aliens, who have declared their intention to become citizens of the United States, and who have filed a certificate of such intention in the office of the Secretary of State, to vote, provided they own or hire real property in the district. It also authorizes tenants of houses or lands, subject to taxation in the district, to vote, whether they pay the taxes or not. Legal voters at town meetings, who have paid a rate bill for teacher's wages within one year preceding, are also voters in the district where they reside.

Any person who has a family, and is a legal voter at town meetings, and has personal property liable to be taxed in the district, exceeding $50.00 in value, exclusive of such as is exempt from execution, is also a voter.

A man without a family, having personal property exceeding $50.00 in value, liable to taxation, is also a voter, because his property is none of it exempt from execution.

Hence it follows that while on the one hand, in some cases, aliens, not legal voters at town meetings, may be legal voters at district school meetings; on the other hand, in all cases, legal voters at town meetings, who do not own or hire real property, and who have not personal property exempt from execution, exceeding $50.00 in value, are not legal voters in district school meetings. And as to be "a male of full age, and a resident of the district," is an essential qualification of every voter, women are necessarily denied the privilege of voting in any case.

A district meeting legally called and assembled, may, by a majority of those present and voting, vote to raise $400.00 or less, for the purpose of building a school-house; and also any sum necessary for the purchase of a site. And if the town superintendent shall certify in writing, that a larger sum is necessary for building a school-house, and shall specify the sum, any amount not exceeding the sum so specified, may be raised by a majority of the legal voters present and voting at the meeting. (§ 70, chapter 480, Laws of 1847.)

School districts are not permitted to mortgage or incumber their school-house lot. But in order to enable a district to raise a large sum of money, without the necessity of laying a tax for the whole of it in one year, § 71, chapter 480, Laws of 1847, provides for raising a tax by installments.

The words "taxable inhabitants," in this section, being used without limitation or qualification, must be construed to mean all who are liable

to be taxed, and who attend the meeting—citizens, aliens, women, minors, residing in the district. The number of taxable inhabitants can be ascertained from the last assessment roll of the town. A majority of such inhabitants attending, to be ascertained by taking and recording the ayes and noes, is necessary to the validity of a vote to raise a tax by installments. But this majority must be made up of *legal* voters, for although this section of the statute requires a majority of all the taxable inhabitants attending to have their names recorded in the affirmative, it does not make all the taxable inhabitants legal voters for the purposes of such a vote. Who then are legal voters under this section? The same persons and no others, authorized to vote by § 59, hereinbefore quoted. Neither women nor minors, nor persons not liable to be taxed, can vote upon the question of raising a tax by installments. Therefore, a man who hires a house, and is a legal voter at district meetings in ordinary cases, but who is not on the assessment roll, and pays no taxes, cannot vote upon this question. If one person owned all the land of a school district, and it was all assessed to the owner, the tenants could not vote upon this question, unless they were assessed for personal property. Non-residents, although taxable, are not such "taxable inhabitants," within the meaning of this section, as to be enumerated in estimating the number of taxable inhabitants in the district, and they are not voters in any case. The tax raised by virtue of this section, must also be raised by *equal* annual installments, for example: If it be voted to raise $1000.00 in five equal annual installments, the sum to be raised each year must be $200.00, and not as some have supposed, $200.00 with the interest, that is $207.00 at the end of the first year, $214.00 at the end of the second year, and so on. Trustees and others must therefore make their contracts accordingly.

Per Morgan, September 26, 1848.

A chairman of a school district meeting is entitled to a vote upon all questions involving the levying of a tax.

This is an appeal from the proceedings of the annual meeting held in said district on the 5th day of April last, in voting a tax of $400.00 for the purpose of building a school-house therein. It appears by the papers in the case, that the resolution by which the tax was authorized, was passed by a vote of six to five against the same. The appellant claims that the resolution was illegally passed, because,

1. The clerk of the meeting refused to call the name of the chair man, denying his right to vote;

2. That had the chairman been allowed to vote, he would have voted against said resolution; and

3. That one of the votes in favor of said resolution, was given by a person who was not a legal voter in said district.

In their answer to the appeal, the trustees concede that the chairman was not permitted to vote upon said resolution, but they deny that he

was lawfully entitled to vote thereon, on the ground that he was chairman of the meeting and only entitled to a casting vote.

The trustees having made this concession have clearly shown that the proceedings of the meeting were not legally conducted, inasmuch as a legal vote was rejected, which if received might have affected the result of the vote upon the resolution. The chairman was equally entitled to vote upon the question of raising the tax with the other tax payers and voters of the district, and the meeting had no right to deprive him of his privileges or others of the benefits which they might have received had his vote been counted.

It is therefore ordered that the proceedings of the meeting aforesaid, so far as the same relate to the resolution authorizing a tax of $400.00 for the purpose of building a school-house, be and the same are hereby set aside.

Per H. S. Randall, June 25, 1852.

Trustees have the power to exempt indigent persons either wholly or in part from the payment of a rate bill, and to collect the same by tax upon the district, but for an abuse of this power, this department will set aside their proceedings.

The facts of this case as agreed upon and submitted are substantially as follows:

On the 22d day of June last, the trustees made out a rate bill to collect the sum of $320.00 due for teachers' wages. In so doing they exempted in the first place several of the persons named in the rate bill from the payment of any part of the amount assessed against them, and then all others from the payment of one-half of their assessments.

The whole amount of the exemptions was $239.29, and to collect this sum, the trustees made out a tax list against the taxable inhabitants of the district. In this tax list is included one of the persons who was wholly exempted, and all of those who were exempted in part, from the payment of their rate bill, and are assessed for real property situated in the district. From the proceedings of the trustees, as above stated, this appeal is brought on the ground that the exemptions were irregular and unauthorized by law.

The statute has vested in the trustees of school districts, the power of exempting, either wholly or in part, as they may deem expedient, such indigent inhabitants as may in their judgment be entitled to exemption from the payment of a rate bill, and to collect the amount of such exemptions by a tax upon the district.

This provision of the law is a wise and humane one, and whenever the authority is judiciously exercised by the trustees in behalf of those who need its benefits, their action will not be disturbed by this department.

But the legislature, in passing such a statute, in my judgment never designed that it should have so extensive and sweeping an effect as has been given to it in this case. It was intended for the benefit of those whose circumstances were such as to render them unable to procure the

means of paying for the tuition of their children. There doubtless were many of this class in the district referred to, and in reference to whom the trustees have very properly exercised the power vested in them by law. But it appears to me they have gone beyond the intention of the statute. They have exempted every inhabitant of the district who sent to school, from the payment of at least one-half of his rate bill, apparently without any reference to the amount of property owned by each. This they had the power to do, provided such inhabitants were unable to pay the amount assessed against them. But the fact that every one of those who were exempted in part, were assessed upon the tax list for real property situated in the district, furnishes strong evidence of an ability to pay. If the property was incumbered to the extent of or beyond its value, the trustees should have made that fact appear. There is, however, no testimony upon that point, and as the case now stands, I am of opinion that all of those who were exempted in part, and one of those who was wholly exempted were not entitled to the benefits of the statute.

For the reasons above stated, it is therefore ordered that the tax list and warrant above referred to be, and the same is hereby set aside.

Per H. W. Johnson, Dep. Supt., August 11, 1852.

When an appeal is pending before this department, all proceedings in the district from whence the appeal comes, in relation to the subject matter involved in the appeal, are stayed until the decision of the appeal.

This is an appeal from the proceedings of a special meeting held in said district on the 7th day of June last.

By the papers in the case, it appears that the meeting was called for the purpose of organizing the district and choosing district officers, and that the same was held while an appeal was pending in relation to the action of the town superintendent in forming the district. This fact being conceded, the proceedings of the meeting must be set aside, for the appeal stayed all proceedings in relation to organizing the district until it was finally decided, and the meeting therefore could not legally be held.

It is therefore ordered that the proceedings of the meeting held in said district on the 7th day of June last, be and the same are hereby set aside.

Per H. S. Randall, October 13, 1852.

A school-house cannot be used for any other than school purposes except by the unanimous consent of the taxable inhabitants of the district.

This is an appeal taken from the action of the trustees of School District No. 16, in the town of Almond, Allegany county, they having suffered the school-house in said district to be opened and employed for the holding of public meetings, resulting in great damage to the building, the fences around it, and the books belonging to scholars.

It is also objected that the school is frequently required to be dismissed from one to two hours earlier than usual, on the days when meetings are held in said school-house, &c.

The employment of a school-house for public and especially for religious meetings, when not wanted for school purposes, has been a time-honored custom upon which the superintendent is reluctant to intrench. Nor should there be in his opinion, any objection raised against the practice except in case of flagrant misemployment of the district property. But the question being raised, the necessity of deciding it according to the law of the land, devolves upon the State Superintendent.

The trustees of each school district have the custody and control of the school-house, for the purposes defined and specified in the act conferring this authority. In general, school-houses are built for the purpose of public instruction by teachers holding regular certificates of qualification, and also to furnish a place for the holding of school district meetings and for no other purpose. No inhabitant of a district can be taxed for firewood employed in warming a room for religious exercises, or cleaning it and repairing the wear, however slight, which attends such use. It is not within the power of a majority, however large, to authorize a tax for any such purpose, nor to devote the district property to any object outside of the purposes of common school instruction which may expedite in the slightest degree the period when such tax will become necessary against the will of a single dissentient tax payer, however ungenerous and unreasonable may be his objections.

In short the employment of school-houses for such objects is only tolerated by general consent. This department never raises the question. On the contrary, it approves the liberality of sentiment which permits the use of these edifices for all praiseworthy objects of public interest, whether denominated religious or secular. It is, however, under the necessity of sustaining the objection when it is made. It is very probable that those who procure such a decision will soon find occasion to regret it, in consequence of being themselves excluded from the use of the school-house for some purpose in which they may take an interest. The exclusion of all persons from occupation of the school-house for other than common educational purposes, applies necessarily to every occupation whether religious or otherwise.

The appeal is sustained.

Per E. P. Smith, Dep. Supt., July 17, 1855.

The assent of a majority of the officers constituting the board is necessary to the validity of any order altering a district; and

If the district be a joint one, a majority of the officers of each of the towns from which such district is formed.

This is an appeal from the supervisors, town superintendents and town clerks of the towns of Argyle and Fort Edward on the 10th day of February last, setting off a part of the above named district to Joint District No. 8, of said towns.

It is conceded in this case, that the order was made without concurrence of the supervisors and town clerk of Fort Edward. The alteration is therefore void, for it is well settled that the assent of a majority of the officers of each of the towns from which a joint district is formed, is necessary to the validity of any order altering the same.

The order above referred to is therefore hereby set aside.

Per H. S. Randall, May 13, 1853.

Where a claim against a school district has been presented to the board of supervisors, and the board direct or refuse to direct the amount to be levied and collected upon such district. an appeal will not lie to this department.

The appellant in this case seeks, among other things, to obtain payment of a claim which he makes against the above named district for costs and expenses incurred in suits brought against him in his official capacity.

To establish the validity of this claim, he has set forth the proceedings of several meetings held in said district at various periods, from 1849 to the fall of 1852, and has given a detailed statement of the manner in which the claim accrued.

In reference to the whole question, it is sufficient to say that it appears from the evidence before me, that this claim has twice been presented to the board of supervisors of the county of Oswego, for allowance, in pursuance of chapter 172, of the Laws of 1847, and each time the board have refused to direct the amount to be collected out of the district From such a refusal, the law has made no provision for an appeal to this department or to any other tribunal. It was evidently the intention of the act of 1847, to make the decision of the board of supervisors in such cases final and conclusive in the premises. I have therefore no power to grant the relief asked for.

Appeal dismissed.

Per H. S. Randall, May 12, 1853.

Where an adjournment of a special district meeting is had for a period more than one month, notice of the object of such adjourned special meeting is necessary.

The appellant in this case seeks to set aside the proceedings of an adjourned school meeting, held on the 2d day of July last, and the proceedings of the trustees in making out a tax list to collect a tax voted at said meeting.

By the papers before me, it appears that a meeting was held on the 24th day of May last, for the purpose of selecting a site and voting a tax for building a school-house. This meeting was adjourned to the 2d day of July. It is conceded by the trustees, that no notice of the adjourned meeting was given, and they claim that none was necessary. The omission to give this notice, is one of the grounds of complaint in the appeal.

By § 81 of the School Law of 1847, clerks of school districts are required to give notice in writing, of the time and place for any

adjourned district meeting, when the same shall be adjourned for a longer period than one month. From this section, it is manifest that notice is required in all cases where a meeting has been adjourned for more than one month. A failure to give such notice would be fatal, as a failure to give any notice of the time and place of holding the annual meeting. The adjournment in this case exceeded one month, and therefore notice of the meeting should have been given. As it was entirely omitted, the proceedings were irregular, and must be set aside.

Per H. S. Randall, October 6, 1853.

No notice of an assessment is required except where an original valuation is made; nor is a notice that a tax list has been placed in the hands of a collector for collection necessary.

The appellants in this case seek to obtain an order setting aside a tax list on the following grounds:

1. That the trustees did not give any notice to the tax payers to meet and review their assessment roll.

2. That they did not give any notice that said tax list was completed and that the trustees would meet on a certain day to receive payment of taxes without any per centage.

3. That the collector did not advertise according to law that he would receive voluntary payment of taxes.

These objections are untenable. The present school law does not require any notice of an assessment to be given by the trustees of a district except when an original valuation is to be made, which was not done in this case. Nor does it require the collector to give any notice whatever that a tax list has been placed in his hands for collection. All of the former provisions of law requiring such notices to be given have been repealed.

The appeal is therefore dismissed.

Per H. S. Randall, May 26, 1853.

Trustees have the power, when in their discretion circumstances require it, to establish temporary branch schools in a district, and employ a teacher, without any vote of the district, and a due proportion of the public money should be applied to the payment of such teacher.

It is, perhaps, to be regretted that the law has left so much to the discretion of trustees, in reference to the institution of temporary branch schools. Such schools frequently become necessary, owing to some extraordinary circumstances which for the time being exist in a district. Whenever such necessity does arise, the trustees have an undoubted right to exercise the discretion which the statute has vested in them, by employing a teacher, and opening a temporary school for the accommodation of the children, without any vote of the inhabitants. In this district the majority of the trustees have, on several occasions, determined that such necessity did exist; and the inhabitants, at their annual meetings in 1850 and 1851, have approved that determination by directing the application of a part of the public money to the sup-

port of the branch school. The institution of such a school in this district, has also met the approval of the town superintendent of Whitestown, as appears from a letter addressed by him to the department, and a decided majority of the taxable inhabitants have expressed themselves satisfied with the proceedings of the majority of the trustees as appears by a petition accompanying the answer.

Under these circumstances, though it does not clearly appear that all the proceedings of the district in relation to the institution of the branch school have been strictly in accordance with law, I am of opinion that harmony and good order which are so essential to the prosperity of a school will be best secured, and the interests of a majority of the inhabitants be best promoted, by sanctioning the proceedings of the trustees in establishing the school in question and allowing a portion of the public money to be applied towards its support.

The proceedings of the trustees are therefore affirmed and the appeal dismissed.

Per H. S. Randall, June 16, 1853

A supervisor and town clerk cannot act in the formation or alteration of a school district, without the presence of the town superintendent.

The appellants in this case seek to set aside an order made at a meeting of the town superintendent of Jefferson, and the supervisors and town clerks of Blenheim and Jefferson, on the 30th day of April last, forming a new district, to be composed of parts of District No. 6, Jefferson, and No. 3, Blenheim.

From an examination of the papers, I am of the opinion there is a fatal objection to this order.

It appears that the town superintendent of Blenheim was not present at the meeting of the board, and did not participate in making the order. The supervisor and town clerk of that town were members of the board, but they had no authority to act without the presence of the town superintendent. The statute authorizes them to be associated with him in forming or altering school districts. In no case, however, does it authorize them to act without him. The board, therefore, had no power to alter any district located in that town.

The order therefore is hereby set aside.

Per H. S. Randall, August 18, 1853.

The right of an acting town superintendent to the office will not be inquired into collaterally.

This is an appeal from an order, setting off a portion of School District No. 8, in the town of Preston, to District No. 2, of the town of McDonough.

The principal ground of appeal, and the only one considered is, that Isaac S. Stafford, acting as town superintendent of Preston, had no right to assist in making this order, for the reason that he had removed

from the town, and thereby vacated his office. The fact that he was the *acting* town superintendent of Preston, is conceded in the appeal.

This being the case, his right to hold the office cannot be called in question in this proceeding. That is a question which can only be tried by an action at law brought for that purpose. The courts have uniformly held that the right of a person to a public office cannot be inquired into collaterally.

Under the former practice, it could only be tested by a writ of "*quo warranto.*" It can now only be tested by an action in the nature of a "*quo warranto.*"

This objection, therefore, to the order is overruled.

Per H. S. Randall, October 26, 1853.

This department will set aside the proceedings of a district meeting, when *undue advantage* is taken of those of the inhabitants who do not happen to be present at the precise hour the meeting is called, especially where the custom has been to hold open until one hour after the time mentioned in the notice before organizing.

This is an appeal from the proceedings of the annual meeting held in the district on the first day of October last.

The appellants allege that the meeting was called to be held at six o'clock in the evening, at about which time three only of the legal voters of the district met at the school-house and immediately organized and proceeded to elect officers, and to make a division of the public money for the ensuing year ; as soon as this business was transacted they adjourned for a year. Soon after and about seven o'clock in the evening, several other legal voters appeared at the school-house accompanied by one of the trustees, who was prepared to submit his annual report, but they found the meeting had been held and adjourned as above stated. They further allege that it had been the custom in that district at their annual meeting to wait until one hour after the time specified in the notice before organizing the meeting.

As no answer to the appeal has been received, these allegations must be deemed established. If they were untrue those who sought to sustain the proceedings of the meeting were bound to deny them.

Upon this statement of the facts I am of opinion that the proceedings of the meeting should be set aside. There was more haste in the transaction of the business than was required, and many were doubtless led to suppose, by the former practice of the district, that nothing would be done before the hour of seven in the evening; besides an opportunity ought to have been given to the trustee whose term expired, to make his annual report. It may lead to serious embarrassment and difficulty hereafter if it is omitted.

The proceedings of said meeting are therefore hereby set aside.

Per H. S. Randall, November 29, 1853.

The mere act of voting to select a particular piece of land upon which to erect a school-house, does not establish the site. It must be followed by an actual leasing or purchase.

The appellants in this case allege, that on the 31st day of May, 1851, at a special meeting regularly called, a resolution was passed authorizing the selection of a site for building a school-house on the land of Mr. Fenner, and the collection of a tax to pay for the same.

The trustees assessed the tax, and about $45.00 of it was collected, but they neglected to purchase the site. On the 12th day of March, 1853, at a regularly called meeting, a resolution was passed authorizing the selection of a site on the land of J. H. Dwick, and a tax of $350.00 for building a school-house. The trustees then took the money which had been collected for the purchase of the site first selected, and with it purchased the Dwick site. It is claimed by the appellants that it was illegal to change the site, after the money had been collected to pay for the same; that no change could be made without the consent of the town superintendent, and that it was illegal to use for the Dwick site, the money that had been raised for purchasing the "Fenner" site.

In reply to these allegations, the trustees state that after the meeting of May 31, 1851, and on the 15th of November of that year, at a special meeting legally held, a resolution was passed rescinding the resolution of the former meeting, authorizing the selection of a site upon the land of Mr. Fenner. At a subsequent special meeting, a resolution was passed authorizing the selection of a site upon the land of Mr. Dwick. No action was taken at that meeting in reference to the disposition to be made of the money which had been raised for the purchase of a site, but at the annual meeting held since this appeal was brought, the trustees were directed to use the money in the purchase of the "Dwick site."

The case referred to by the appellants, in Barbour's Supreme Court Reports (vol. 4, p. 25), in support of their first objection, does not sustain the point they raise. The court merely decides that a district cannot legally rescind a resolution *imposing a tax*, after the tax list has been made out and the tax partly collected. That decision is in accordance with repeated decisions of this department in which it has been held, that a district could not legally rescind a resolution conferring any authority upon the trustees, after they have entered upon the performance of the duty imposed by the resolution. But these decisions do not touch this case. The resolution authorizing the collection of the tax, was distinct and separate from that authorizing the selection of the site, and the repeal of the latter in no respect affected the right of the trustees to collect the tax. Besides, it is conceded and in fact is made the subject of complaint by the appellants, that the trustees had not taken any steps towards purchasing the site named in the resolution which was rescinded. If they had not, the district clearly possessed the power of rescinding the resolution in the manner they did,

unless their action had so established the site that it could not be changed without the consent of the town superintendent. The mere act of voting to select a particular piece of land upon which to erect a school-house does not establish the site. Something more is necessary to accomplish that. The vote must be followed up by an actual leasing or purchase. In this case there is no pretense that a title to the site could not be procured. But it is alleged that the trustees neglected to procure it, although they might have done so, and the district afterwards took from them the authority to make the purchase. This, I think, they had a right to do without the consent of the town superintendent, if they deemed it proper. I can therefore perceive no illegality in the proceedings of the meeting, in selecting a site upon the land of Mr. Dwick.

The appeal is therefore dismissed.

Per H. S. Randall, November 29, 1853.

It is the duty of trustees when requested by a respectable number of the taxable inhabitants of their district to call a special meeting for the transaction of any legal and proper business, which such petitioners may desire to bring before it.

This is an appeal from the refusal of the respondents to call a special meeting of the inhabitants and legal voters of the district for the purpose of taking into consideration the application and division of the public money of said district on the request of twenty taxable inhabitants thereof. The trustees in their answer set forth certain facts and circumstances existing in the district which in their judgment justified them in declining to call such meeting and in making such disposition of the public money as they should deem expedient.

This view of the subject cannot in the opinion of the superintendent be sustained. It is the duty of the trustees of a school district, whenever requested by a respectable number of inhabitants and legal voters of a district, to call a special meeting for the transaction of any legal and proper business which such inhabitants may desire to bring before it. The object of the petitioners in this case was unquestionably a legal and proper one. The inhabitants and legal voters of the district are authorized to make such disposition of the public money among the several terms of the school as they may judge proper, and it is only when they omit to act in the matter that the trustees are empowered to exercise their own discretion. If an improper disposition of the public money is made by the inhabitants, an adequate remedy is provided by appeal to this department. The circumstances, therefore, set forth by the trustees in their answer were insufficient to justify them in their refusal to call the special meeting called for. The trustees therefore are hereby ordered, within five days after the receipt of this order, to cause notices to be given for a special meeting of the legal voters of the district, to be held within ten days thereafter, for the purpose of taking into consideration the application and division of the public money of said district for the ensuing year, &c.

Per E. W. Leavenworth, February 28, 1854.

Where trustees give their order for a greater amount of public money to pay a teacher than is in the superintendent's hands, and, to make up the deficiency, anticipate the public money for a succeeding year, and pay it out of their own funds, they are without remedy; the deficiency should be collected by rate bill.

This is an appeal from the order of the trustees for the amount of public money due a teacher employed by them, including a balance of $6.50 advanced by one of the trustees on a previous order made at the termination of the summer school. The appellants insist that the balance should have been raised by rate bill on the inhabitants sending to school during that term.

From the papers in the case it appears that Harriet A. Cooper, a legally qualified teacher, was employed by the trustees to teach the summer school at $12.00 per month; that at the expiration of her term an order and certificate was drawn on the town superintendent for the whole amount of her wages, $36.00, of which $29.50, being the whole amount of teachers' money in the hands of the town superintendent belonging to the district for the current year, was paid, and the balance, $6.50, advanced to the teacher by Mr. Allen, one of the trustees; that Miss Cooper, prior to the expiration of the summer term, was reëmployed for the winter term at $16.00 per month, at the expiration of which, and on the 10th of March last, the trustees gave her an order on the town superintendent for $62.50, being the amount of her wages for that term, with the addition of the $6.50 advanced by Mr. Allen, as aforesaid; and that such order was accepted by the town superintendent, payable from the teachers' money to be apportioned to the district for the present year.

The superintendent is of opinion, under these circumstances, that the trustees erred in including in their order and certificate for the winter term the balance due on the summer term. After exhausting the public money applicable to the latter term, they should have collected the balance by rate bill; if they were at liberty to anticipate the public money for a succeeding year by advancing the amount due, they might, upon the same principle, continue such a procedure indefinitely, and thereby thwart the obvious intention of the law and the views and wishes of the inhabitants of the district. The amount in controversy in the present case is small, but the principle involved is one of the utmost importance to the proper administration of the system of public instruction.

The trustees are, therefore, hereby directed to amend their order and certificate in the hands of the town superintendent, by reducing the amount to $56.00, the sum due on the winter term, and to make out a rate bill and warrant in the mode prescribed by law for the collection of the balance from those who sent to school during the summer term.

Per E. W. Leavenworth, April 5, 1854.

Where inhabitants have been properly set off from one district to another and the town clerk has omitted to record the same, they will be regarded as inhabitants of the district to which they have been annexed after being acquiesced in for five years

Appeal from the proceedings of a special meeting held on the 28th of March last, authorizing the trustees to levy a tax on the district to defray the expense of moving the school-house to the new site or to let the job of moving the same to the lowest bidder. The appellants in support of the appeal allege,

That seven persons, who attended the meeting and voted, were not inhabitants of and legal voters in said district, having been annexed in 1839 to Joint District No. 1, Blenheim and Fulton, and there being no record in the town clerk's office of either of said towns of their subsequent transfer, either to District No. 5 or any other district.

In reply to this allegation the affidavits of the town superintendents of Fulton and Blenheim for the year 1849 are produced, showing that the individuals referred to and their property were in the spring of that year transferred by them from Joint District No. 1 to District No. 5, and that the order made by them to that effect was transmitted or delivered to the town clerks of their respective towns for record. It also appears from the affidavit of the appellants that from that period to the present the persons so transferred have acted in and been regarded as inhabitants of District No. 5, and their children enumerated therein. Under these circumstances and after an acquiescence of five years the proof of such transfer must be regarded as sufficient, notwithstanding the omission of the town clerks to record the same.

Per V. M. Rice, May 12, 1854.

A tax voted for the purchase of a site cannot be raised by installments. A tax list for the whole amount must be made out within thirty days from the voting of the tax.

This is an appeal from the proceedings of an adjourned special meeting, held on the 4th of May last, at which the site of the school-house of the district was changed and a tax of $200.00 voted to build a school-house thereon and to fence the site, such tax to be collected in two equal installments, one-half on the 1st of September and the remainder on the 1st of December next.

There is an objection appearing upon the face of the proceedings, which is fatal to the validity of the vote for raising the tax for purchasing the site. The superintendent is unable to find any authority in the school law for raising the amount provided for by the vote of the district in two installments, one payable in September and the other in December next. When a greater sum than $400.00 is directed to be raised for building a school-house, in the manner prescribed by § 71 (No. 93), School Laws, such amount may be raised in equal annual installments, as therein provided; but where the amount to be raised is for the purpose of a site, no provision exists for raising such

amount by installments, and the law requires the tax list for the whole amount to be made out within thirty days from the voting of the tax. The resolution referred to was therefore illegal and invalid for this cause, and so much of the proceedings of the special meeting appealed from as relates to the raising of the tax of $200.00 to purchase and fence the site, payable in installments, as therein specified, is hereby set aside.

Per V. M. Rice, Supt., June 12, 1854.

A school district cannot be formed out of the central portion of another district, leaving the territory of the latter disconnected.

This is an appeal from the order of the town superintendent of Fremont, Sullivan county, creating a new district (No. 6) from territory now known as District No. 5 of said town.

The appellants raise the following point:

1. Said order of the town superintendent erects a new district (No. 6) in the central portion of District No. 5, thus disjoining the parts of said District No. 5.

The question to be considered is:

Can a district be formed out of the central portion of another district, leaving the former disjointed? The answer is clearly in the negative, as has been the uniform ruling of this department. (See Common School Decisions, p. 109.) In the case there cited, Superintendent Dix properly remarks that school districts must be formed of contiguous farms. If the example of forming them of farms not adjacent to each other should be sanctioned, it is difficult to foresee what disorder and confusion it might not create, besides opening a door to unequal and unjust organizations.

It is therefore decided that the order of the town superintendent, as hereinbefore recited, is illegal, and the same is hereby set aside.

Per V. M. Rice, September 18, 1854.

Where one trustee employs a teacher without consulting with his associates, and his action is silently acquiesced in until the expiration of the term, their approval of the contract will be implied, and they should sign an order for the public money for teachers' wages when applied to.

This is an appeal taken by a teacher from the action of two of the trustees of School District No. 8, in the town of Oxford, Chenango county. Said trustees refuse to sign an order upon the town superintendent of Oxford for the sum of $20.00 to compensate the appellant for her services as teacher of the school in said district, upon the ground that the appellant was employed in January, 1854, as teacher by George Stratton, the third trustee, upon his own responsibility, the respondents not having been informed by said Stratton of the employment of the appellant, nor of the conditions either of time, wages or qualifications; and that therefore appellant is not entitled to any share of the public money for the school taught by her last winter.

It appears that said Harriet Webb was employed by one of the trustees in his official capacity to teach a public school, in said district at the rate of two dollars a week, and that she was so employed ten weeks. Neither of the other trustees appear to have dissented. They cannot be presumed to have been ignorant of the fact, and must be considered as having acquiesced. This is the view which would be taken in any court of judicature having jurisdiction of the case.

The appeal is therefore sustained, and the town superintendent of the town of Oxford, is hereby ordered to pay to the said Harriet Webb, for her services as teacher in said district, the sum of $20.00 from the share of the public money belonging to said district.

Per V. M. Rice, October 23, 1854.

An alien, though he has taken the incipient measures to be naturalized, is not qualified to vote at a school district meeting in the district where he resides, unless an affidavit of that fact be filed and recorded in the office of the Secretary of State.

This is an appeal taken by five of the inhabitants from the proceedings of a special school district meeting, holden in District No. 6, in the town of Montague, Lewis county, in the early part of October, 1854.

The appellants aver that persons not duly qualified to vote did vote at said meeting, and that their votes affected the result. It seems that the only material vote of the meeting was carried by two majority, whereas the right of three persons to vote, who voted with the majority, was doubtful. One of them was a man working for a resident of the district, but whether he was of legal age and possessed the other requisite qualifications is by no means certain.

The other two persons, Messrs. Fuller and Boyd, are aliens, and only during the week that the meeting of May, 1854, stood adjourned to, did they file their intentions of becoming citizens. An alien, though he has taken the incipient measures to obtain naturalization, cannot hold real property or be a qualified voter at a school district meeting in the district where he resides.

He is required to make a deposition or affirmation in writing, before an officer authorized to take the proofs of deeds to be recorded, that he is a resident of and intends always to reside in the United States and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, which shall be certified by such officer, and be filed and recorded by the Secretary of State in a book to be kept by him for that purpose, and such certificate, or a certified copy of it, shall be evidence of the facts therein contained.

As Messrs. Fuller and Boyd did not comply with the requirements of the statute, and therefore could not become owners of taxable property, the conclusion becomes a necessary sequence that the vote was void.

Per V. M. Rice, October 30, 1854.

The statute directing town superintendents to pay out public money only to qualified teachers duly employed upon the order of the trustees employing them, was enacted for the purpose of preventing embezzlement by trustees, and if he pays the public money to a trustee or other person than the teacher without his order, he does it at his peril.

This is an appeal taken from the action of the trustees in School District No. 9, in the town of Otto, Cattaraugus county, by a teacher duly employed in said district during the last winter, on the ground of withholding from him a portion of his salary, amounting to the sum of $15.86. The appeal is without answer.

The appellant testifies that while he was engaged in the employ of said trustees, two of them, to wit, Isaac Reed and Daniel R. Grinals, wrote an order for the residue of the public money apportioned to said District in 1853, making it payable to appellant; that Reed went without appellant's knowledge or consent and drew said money in appellant's name from the town superintendent of Otto, which money amounted to $15.86, as aforesaid; that when appellant closed his term, said trustees (two of them) gave him another order upon said town superintendent for $52.56, to be paid in part of the residue of the public money apportioned in 1854; that said superintendent paid $36.64 on said order and retained it in his possession, but refused to pay any further amount, saying that he had paid the remainder to said Isaac Reed, one of the trustees of said district.

The provision of the law which directs town superintendents to pay out public money only to qualified teachers duly employed, upon the order of the trustees employing them, was enacted for the express purpose of preventing the opportunity of embezzlement by trustees. If in the face of this fact public money is paid to a trustee, in the name of a teacher or otherwise, without a properly attested order from the person to whom it is due, the town superintendent does it upon his own responsibility. In the case in controversy, the trustee, Reed, is liable for the means by which he obtained the money, and the town superintendent of Otto is responsible to School District No. 9 for the amount paid by him to Reed, and he must make good the deficiency, looking to Reed for reimbursement.

This appeal is accordingly sustained, and the town superintendent of Otto is hereby ordered to pay to said Hosea Edwards, teacher aforesaid, the sum of $15.86 claimed by him, and to preserve District No. 9 good in that amount, not charging said district for the amount paid illegally by him to said Isaac Reed.

Per V. M. Rice, November 11, 1854.

Where two trustees employ a teacher, without consulting the third, the contract is binding only upon those who send to the school and the trustees making the bargain, unless the conduct of the third trustee is such that his acquiescence may fairly be inferred.

This is an appeal of a trustee of School District No. 6, in the town of Vernon, Oneida county, from the action of his two colleagues, upon

the ground that a teacher has been employed to instruct the school of said district, commencing on the 30th day of October last, and to continue through the winter, in and relating to which engagement the appellant was not consulted, and had no knowledge. The respondents acknowledge the fact as charged, pleading that they had no suspicion that he would object.

The basis of this appeal rests upon broad principles, involved in the general laws of trust which govern all fiduciary transactions. Contracts entered into by all the trustees of a school district, and signed by two of them, are binding; and when so signed, the presence of the third is presumed until the contrary is shown. Two trustees can contract against the will of the third, if he was duly notified of a meeting of the trustees, or was consulted and refused to act. (9 Wendell, 17.)

The appellant not being consulted in the contract with the teacher, Miss Delia A. C. Alford, could in no sense be responsible, unless when he discovered the fact he should have acquiesced.

Yet no fiduciary transaction can exist without all parties to it are cognizant. The contract in question is binding only with the respondents and those sending to the school, but is void so far as the trustees officially and the district are concerned.

The appeal is therefore sustained.

Per V. M. Rice, November 21, 1854.

Trustees have the power to call special district meetings whenever they shall deem it necessary and proper, even though a meeting for the same purpose stands adjourned for a period more or less remote.

This is an appeal taken by three taxable inhabitants of School District No. 11, in the town of Skaneateles, Onondaga county, from the proceedings of the trustees of said district, in relation to a tax levied therein, by the order of a special district meeting. The appellants state, that at a meeting held in said district, January 14th, 1854, permission having been obtained from the town superintendent, a tax of $500.00 was voted for the purpose of building an addition to the school-house, which tax was duly collected; that the work was let to two bidders, for $525.00, without consulting the district, or being authorized by a special meeting, thus exceeding their powers; that at the annual meeting, the district refused to vote a tax for the additional $25.00; that a special meeting was called for the purpose of voting upon such tax, and held on the 18th of November, 1854; which meeting, without entertaining the proposition, resolved, by a vote of 19 against 10, to adjourn twenty-five weeks; that directly afterwards, the trustees called another special meeting, of which they gave notice themselves (the clerk having refused); that said meeting was held on the 25th of November, and by a vote of 24 against 21 levied the said tax of $25.00; that said meeting was held in the afternoon, contrary to the usual custom of the district, and at a time when a previous meeting, called to consider this very question, stood adjourned.

There can be no doubt of the authority of the trustees of school districts to call special meetings whenever they shall deem it necessary and proper.

The statute declares this right in express terms, without regard to the circumstance that a meeting is already called, or stands adjourned for a period more or less remote. It is not difficult to imagine cases in which the interests of the district would sustain serious damage, if it was necessary to defer action till a period fixed by a previous meeting. Exigencies often arise, imperatively requiring that the inhabitants of a school district assemble within the shortest time practicable, and of these the trustees are to be the judges.

The appeal is dismissed.

Per V. M. Rice, January 22, 1855.

Trustees cannot retain moneys in their hands to compensate them for services which they may have rendered as trustees.
The office is merely honorary.

The trustees of School District No. 5 have retained in their hands different sums, amounting in the aggregate to $16.50, as it is stated in the appeal, for their services in bringing teachers to the district, taking them to be examined and carrying them home.

The only case in which a charge for expenses of transporting teachers could be sustained, would be where it was part of the contract with the teacher that her expenses for traveling should be defrayed. In this case they would constitute and should be charged against the teacher as wages paid. The trustees are entitled to no remuneration from the district for their services in that capacity, the office being purely honorary.

They can retain no money for themselves except when they might have paid it for similar services to third persons, and then only for purposes expressly enumerated in the statute; carrying teachers to or from the place of their employment is not among those purposes.

The appeal is therefore sustained, and the trustees above named are severally ordered to pay to the town superintendent, for the use of the district, the amount which appears by the account aforesaid to have been illegally expended and retained by them.

Per V. M. Rice, February 19, 1855.

Trustees are to assess the road bed of a turnpike precisely as if that portion of it lying in their district belonged to an individual not owning the remainder; unless the net annual income of the company over and above all expenses for repairs, &c., is less than five per cent upon the original cost, in which case the road is exempt from taxation.

The turnpike company were not assessed upon the town roll, and the trustees admit that they gave no notice of the completion of their roll, and consequently neither the appellant nor any other person had the opportunity of calling for the correction of the valuation of the company's property. The appellants swear positively that the property of

the company assessed at $600.00 is worth $2000.00, and the respondents in their answer show that they assessed it simply as they would agricultural property at $30.00 per acre, and apparently without allowing anything for the labor and materials employed in making the land covered by the road bed productive and valuable as a turnpike. It is of course impossible for the superintendent to judge to what degree this valuation may be erroneous. It is sufficient objection, however, that the appellant has not had the opportunity, which the statute designed to secure, of producing such evidence to the trustees as he deemed proper to induce them to increase this valuation and thereby lighten the burden of his own taxation. The judgment of the supreme court, in the case of the "Albany and Schenectady Railroad Company vs. Osborn," (12 Barb. Supreme Court Reports, 223), shows that the appellant is mistaken in supposing that the value of the stock is to control the trustees in judging of the value of that portion of the plank road in their district. They are to assess the road bed precisely as if that portion of it in the district belonged to an individual owner, not owning the remainder, unless the net annual income of the company over and above all expenses and repairs and collection of tolls is less than five per cent upon the original cost of the road, in which case the road is exempt from taxation. (Laws of 1854, p. 168.)

Per V. M. Rice, March 24, 1855.

In the apportionment of public money, trustees should be governed by the wishes of the district; therefore, when the inhabitants at a district meeting adopt a resolution in reference to the apportionment of the public money which was not by its terms restricted to one year, the trustees should regard it as continuous in its operation.

It is stated to have been the custom of the district to apply two-thirds of the public money to the winter term, and the remainder to the summer term. The appellant desires this apportionment to be continued. He states that no vote was taken on the subject of a division at the last annual meeting, under the impression probably that such direction was in force for a period longer than a year.

It is not perceived that the statute requires the inhabitants to reiterate their wishes annually in this respect, and as it is a matter in regard to which the interests of the district are not liable to change from year to year, there is no reason of policy requiring such an interpretation. If the last resolution adopted by the district in relation to this subject was not by its terms restricted in its operations to a year, or some other definite period, the trustees should regard it as still in force and as furnishing the rule for their action.

As it does not appear from the appeal what the fact may be in relation to this point, the superintendent can only indicate the principle which should govern.

It is inferred, from the statements of the appeal, to be quite probable that a portion of the $52.00, said to be due to the teacher for wages, was earned by service rendered prior to the 1st day of last January, in

which case it should not be compensated from the money apportioned this year, but a rate bill should be issued, the amount collected upon which shall be employed to remunerate said teacher, or to replace the sum, if it has been borrowed from the apportionment of this year.

The appeal is sustained.

Per E. P. Smith, Dep. Supt., April 24, 1855.

Where there is a deliberate omission to notify any taxable inhabitant of a special district meeting, at which a tax is voted to change site and build a new school-house, this department will hold the tax list inoperative as to those so omitted to be notified.

The appellants were set off to District No. 8, on the 17th of January last, by an order, to take effect on the 1st day of May instant. After the making of this order, several meetings were held in District No. 4, of which the appellants had no notice, and which they did not attend, under an apparent belief, on all hands, that they had ceased to be voters in that district. At these meetings the site of No. 4 was changed to a point more remote from the appellants than its former situation, and a tax of $400.00 was authorized for building a new school-house. On the 9th of March, three of the appellants were served with a written notice that a meeting of Joint District No. 4, Scott and Sempronius, would be held on the 16th of that month, the notice not specifying the object of the meeting. At that meeting resolutions were passed, reciting that doubts were expressed in regard to the legality of the calls of the meeting before referred to, and reaffirming and adopting the votes for the release of the old site, the location of the new one, and for a tax of $400.00. Under the authority of this last meeting, the trustees have made out a tax list, including the appellants, from which and from the proceedings of such meeting the latter appeal.

The facts are presented upon an agreed statement signed by the appellants and trustees. There appears to have been a deliberate omission to notify the appellants of the meetings subsequent to January 17th, and an omission to give them a notice of the object of the meeting of March 16th, which, taken in connection with the manifest injustice of subjecting them to taxation for a school-house from which they are to receive no benefit, are sufficient grounds for declaring the tax list inoperative as against them.

The appeal is therefore sustained so far as the same relates to the tax list, and the trustees are authorized and directed to correct and amend the same by striking out the names of the appellants, and apportioning the amount of taxes assessed to them upon the remaining taxable inhabitants and property of such district, in proportion to the valuation thereof.

Per E. P. Smith, Dep. Supt., May 9, 1855.

Town superintendents have no authority to alter the boundaries of a school district, if the same have been established by this department upon appeal, until after the lapse of three years from the time they were so established, without express permission of the State Superintendent.

The appellants, in making their annual report, enumerated among the children of their district the five children of Mr. William Raynor. In making his apportionment, the town superintendent deducted these children from the enumeration of District No. 22, on the ground that they and their father were residents of the adjoining district, No. 21. The trustees of the latter district answer the appeal.

It appears from the evidence that the farm of Mr. Raynor was taken from District No. 22, some five or six years since, and annexed to district No. 21, by an order of the town superintendent, that officer not being aware that the line between the said districts had been established in 1830, by the State Superintendent, upon appeal.

It has been held that town superintendents have no power to alter the boundaries of a school district if the same have been established by this department, upon appeal, unless consent shall have been previously given by the State Superintendent for such alteration. This rule was established to prevent the decisions of the department from being deprived of any practical effect, as might be the case if, immediately after the decision, a new order could be made precisely or substantially similar to the one which has been set aside.

This reason fails, however, when lapse of time and a consequent change of circumstances may have made the reasons no longer applicable which controlled the decision. As this is a subject of regulation, it will hereafter be held that, after a lapse of three years from the time when the boundary of a district shall have been established by this department, upon appeal, it shall no longer be requisite to apply for express permission of the State Superintendent to authorize a local officer to make an alteration of the same.

In the case under consideration the appeal should be sustained, without reference to the above mentioned objection. It is the duty of the town superintendent to apportion the public money according to the number of children in the several districts "as the same shall have appeared from the last annual reports of the trustees," and not otherwise. If he deems the report incorrect it is proper for him to call upon the trustees to correct it, and if they refuse to do so, they may, perhaps, render themselves liable to the penalty imposed for willfully signing a false report, with the intention of causing the town superintendent to apportion and pay to their district a larger sum than its just proportion of the school moneys of the town. The report, however, is conclusive until it shall be amended by the trustees, or the question be determined on appeal.

Per V. M. Rice, May 12, 1855.

The drawing of an order for public money is a ministerial act, which does not necessarily require the presence of the entire board of trustees.

The drawing of an order is a ministerial act, which does not necessarily require the presence of the entire board of trustees. It is simply the execution of a contract, which is obligatory upon all of them, if, as is to be presumed, the contract was regularly made. Its validity is not questioned by the appellant.

The respondents aver that Mr. Payne had refused to act with one of them, and present this as a reason for not consulting him upon drawing the order.

This would not excuse the omission if the act was one which involved the exercise of judgment, and therefore required a meeting of the entire board. A trustee cannot be permitted to retain his office as a mere obstruction to his colleagues. If he cannot act with his associates, he should resign; and if, without resigning, he neglects to perform the duties of his office, it is the duty of the town superintendent to prosecute him for the penalty imposed by the statute. But until he has resigned or been superseded, his colleagues should call upon him regularly to take part in their official action, to the end that when his neglect and contumacy shall be established by reiterated refusals, an application may be made to the State Superintendent for his removal.

Per V. M. Rice, Supt., June 26, 1855.

The statute authorizes the asssociation of the town clerk and supervisor with the town superintendent, upon the application of the trustees of any district to be affected by their action.

If only one trustee make such application, such board does not obtain jurisdiction of the subject matter; the application of a majority or all of such trustees is necessary.

In this case, districts situated in both towns being affected by the proposed order, a single trustee of District No. 2, in Halfmoon, and of Joint Districts No. 8 and 18, in Halfmoon and Waterford, applied to the supervisors and town clerks of the two towns to be associated with the superintendents in their deliberations. The order was made by this board, thus assembled, and the answer sustaining and defending it is signed by every member.

The appellants insist that the board was entirely destitute of jurisdiction. The statute authorizes the association of the town clerks and supervisors with the town superintendents only upon application of the trustees of any district to be affected by the proposed action. If a majority of the trustees of any one district make the application, it cannot be doubted that jurisdiction is given as to all; in this case, however, a majority of the trustees of no district made the application, and the supervisors and town clerks, composing a majority of the board, had no authority whatever in the premises.

Considerable research has failed to discover any adjudged case in which the precise point here presented has been determined. It is,

however, believed to be impossible, in accordance with general principles, to sustain an order made by a tribunal, which in its constitution as a whole has no jurisdiction, although including persons, as in the case of the two town superintendents, who acting alone by themselves would have possessed the requisite authority, and although these persons all concur in the order, and nothing appears showing that their judgment was in any degree controlled or their deliberations affected by the presence of third parties.

The difficulty is, that it must always be practically impossible to ascertain whether the decision is in fact the unbiassed judgment of those to whom the duty of making it has been committed by law. It may be said that a judicial officer is not only blameless but praiseworthy for seeking to enlighten his own mind by the suggestions of disinterested and intelligent advisers. There is a manifest difference, however, between his voluntary application, which is consistent with that judicial independence which it is so important to preserve, and his being subjected to the influence of persons claiming to deliberate with him as a matter of right. It is, moreover, an element in the policy of the law, that all persons required to exercise judgment for the public good should be held to an individual responsibility, and not be permitted to diminish it by distributing a part of the burden among others.

The appeal is sustained.

Per V. M. Rice, July 14, 1855.

Trustees cannot give notice for themselves, and receive it for the district as trustees, of an application to be set off to another district, and assent to being set off in their official capacity. They cannot act in a two-fold capacity.

The appellants state that two of the trustees of their district made application to the town superintendent, without giving notice to their colleague, that their own lands might be set off to District No. 5, and that upon that application, without consent of the other trustee, the order was made setting off one of them, Mr. Southworth. It does not appear, although it may be surmised, that Mr. Ellis is the other trustee thus applying. If such was the fact, there would be no notice, in a proper sense, to any trustee of the district. When they applied to be separated, it was in their individual capacity and not in their official character.

They were acting, "*prima facie*," not in behalf of but against the district; applying as private individuals to be set off, and assenting to being set off in the capacity of representatives of a constituency that may, if the practice should be tolerated, be without an opportunity of opposing. It follows, therefore, that notice to them has no effect whatever upon the rights of the district. There is no evidence in this case that any written notice of the order has been served upon the third trustee, or in fact upon any trustee. The contrary is to be presumed, from the fact that one of the answers sets up their application and consent as dispensing with such notice. The order, then, has not taken effect.

There exists a manifest objection to impairing the resources of a feeble district to swell those of one relatively stronger, and it is against the settled ruling of this department.

The appeal is therefore sustained.

Per E. P. Smith, Dep. Supt., July 19, 1855.

The right to vote at a school district meeting does not depend upon the fact that the person offering to vote has been actually taxed, but rather upon his liability to taxation.

A motion to reconsider a vote of a district meeting may be made by a person voting with the minority, unless the meeting have a different rule.

The objections of the appellants are, that two persons voted at the district meeting, for the change of site, who are not enrolled upon the tax list as taxable inhabitants; that by the list referred to, there are twenty-six taxable inhabitants; that only twelve "taxable inhabitants" voted in favor and twelve against the resolution changing the site; that the motion to reconsider a former resolution adopted at a previous meeting, in regard to the site, was made by a person who, at such previous meeting, voted against the resolution of which he moved a reconsideration.

The rule of legislative proceedings, which requires a motion for reconsideration to be made by one who voted with the prevailing party, is not binding upon the district meetings, unless expressly adopted by them. There is, therefore, no force in the objection based upon a departure from this rule, as it does not appear to have been acted upon by the inhabitants of District No. 14.

The respondents allege that fourteen persons voted for the change of site. This is not inconsistent with the allegation of the appellants, for they acknowledge that twelve "taxable inhabitants" thus voted, and they aver that two persons whom they deny to be legal voters also voted for the resolution. It was then properly passed, provided the two persons named had a right to vote. Their title is impeached, on the naked ground that they are not enumerated on the tax list. This evidence is not sufficient to bar their right to vote, which depends not on the fact that they are actually taxed, but upon their liability to taxation; besides, they may have been qualified as being authorized to vote at town meetings, and having paid a rate bill within a year, although possessing no property liable to taxation. It devolves upon the appellants to disclose affirmatively such grounds of objection to one who has been admitted to vote, as, if taken for true, in the very words stated, will repel every presumption by which his claim might be sustained, by showing the absence of some essential qualification. This the appellants have failed to do, and the objection must be disregarded and the appeal dismissed.

Per E. P. Smith, Dep. Supt., September 15, 1855.

Town superintendents should always give notice to the trustees of their intention to consider any proposed alteration of their district, so that they may have an opportunity of associating with him the supervisor and town clerk.

On the 4th day of April, 1855, the appellees made an order for altering the district, by setting off all that portion situated in the town of Independence, without obtaining the consent or giving notice to the trustees. The original order stated that it was to take effect on the 1st day of May, but in the copy served on the appellant this provision was omitted.

The district was established upon an appeal by the State Superintendent in 1844, and no permission was obtained for its alteration. No answer is put in by the town superintendent.

Without considering the expediency of the order, it is sufficient for the decision of the case that the proceedings are entirely irregular. The order could not take effect until three months after service of notice thereof upon the trustees of the several districts affected by the same, except by their assent duly obtained to its provisions.

The appellant is correct in believing that town superintendents should always give notice of their intention to consider a proposed alteration, so that the trustees may have the opportunity of associating the supervisor and town clerk in the proceedings and of urging their own objections; Superintendent Benton declares that an omission in this respect renders the order void.

The appeal is therefore sustained and the order of the town superintendent vacated.

Per V. M. Rice, May 28, 1855.

The general rule is, that the residence of the parents is the residence of their children who are for the time being at service under a temporary engagement or for a period of uncertain duration. Exceptions considered.

The appellant objects that two persons who performed daily chore work in his family and attended the school in District No. 6, but whose permanent residence was in another district, were excluded from receiving any reduction of their rates by the public money. He acknowledges his liability to pay for the tuition of one of them, Harriet Osterhout, but avers that he gave express notice that he would not be liable for that of the other, who is her brother, Daniel Osterhout. He also submits an affidavit from the father of these children, stating that the contract in relation to Daniel was that he should be permitted to attend school for five days in each week, and that he should work for the appellant upon the sixth and whenever out of school on other days.

There is often considerable difficulty in determining whether servants employed from other districts, whose engagement is temporary or of uncertain duration, should be enumerated where their employer or where their parent resides. The general rule unquestionably is, that the residence of their parents is the residence of employees. There is an exception, however, in the case of children who may be at service in

this state, but whose parents reside in some other state of this Union or in a foreign land. In such instances they are to be reported in the districts in which they actually reside at the date of the report, although that residence may be temporary. It is, however, expressly declared that the report "shall not include children belonging to the family of any person who shall be an inhabitant of any other district in this state, in which such children may, by law, be included in the reports of its trustees."

It is not consistent with the policy of the school law to allow the resources of a district to be impaired or rendered uncertain, by the capricious withdrawal therefrom, for a season, of children whose parents may prefer the school of a neighboring district. On the other hand, the state has the same interest in the education of those persons whose circumstances require them to resort to domestic service for a livelihood, as in that of more fortunate children. It is sound policy to encourage their employers to permit their attendance at school, by rendering its expense as little onerous as possible. If they are apprenticed during their minority, or if manumitted by their parents, and working for their own behalf, they ought clearly to be enumerated in the district where their employer resides, and their tuition bills should be canceled or reduced by its public money.

In other instances the question may turn upon the point whether their presence in the district has for its principal object domestic service in a family, and their attendance at school is a mere incident, or whether the attendance at school is the principal inducement, and the service a mere incident to such attendance. It is impossible to lay down a rule with the requisite precision to meet all cases.

In the case now in controversy, the evidence is insufficient to render the superintendent quite sure that a correct decision is rendered. It is therefore not proper to interfere with the action of the respondents.

The two children may have been enumerated in No. 6, where their father resides; it is affirmed by the respondents that this actually was the case. Even though they had also been wrongfully enumerated in District No. 6, it would remain in the power of the trustees, upon being convinced that they were non-residents, to exclude them from the benefit of the public money.

It is denied that the appellant gave notice that he would not be responsible for the tuition of Daniel Osterhout; but in case he had the general control of him as a servant, the permission to attend the school is sufficient to render him responsible. If on the other hand, the contract of hiring required him to allow Daniel to attend school, he must be regarded as having contemplated the legal liability which it would impose upon him, and as having regarded the youth's services as a just equivalent. It is by no means to be supposed that the appellant expected to obtain those services at the expense, in any degree, of the district.

The appeal is therefore dismissed.

Per V. M. Rice, May 25, 1855.

Presumptively, the trustees of a school district have no right to go beyond the boundaries of their district to tax; and when they do, it lies upon them to establish the power to tax, and not upon the party taxed to disprove it.

The trustees, in the answer, rely upon the fact that the appellant did not show that he claimed a reduction of his tax, or that he notified them of the alienation of the property by the taxation of which he is aggrieved. They do not deny any of the facts set up in the appeal.

The appellant avers that, about two months previous to the making out of the tax list, he had sold the southern part of lot No. 35 (120 acres), in parcels, to two persons, who took possession and resided upon it. It is not within the limits of District No. 7, but adjoins land owned by the appellant in that district. This is the only circumstance in support of the authority of the respondents to tax it. The statute, however, requires that it should be owned or possessed by a taxable inhabitant of their district at the time of making out such list.

The power being in derogation of common right, which would exempt all land from being taxed elsewhere than in the district where it lies, must be construed rigidly. The possession of the purchasers is of itself notice of their rights and should put the trustees upon inquiry.

While the last assessment roll is to guide them in the *valuation* of any property which they may be authorized to tax, unless the right to a reduction of such a valuation be established, it cannot in the nature of things establish the liability of such property to taxation. Presumptively, the trustees have no right to go beyond their district limits; when they do so, it lies upon them to establish the power, and not upon the party taxed to disprove it or to take notice that it is about to be exercised unless he remonstrates.

The appeal must be sustained.

Per V. M. Rice, February 28, 1855.

A consultation of two trustees, without the presence and advice of the third, can result in nothing which can be regarded as the action of the board, unless the third has been regularly notified and fails to be present.

The controversy, in this case, respects the validity of the contracts with three different teachers. No one of them has been engaged in a legal manner, for in no case have the trustees met and consulted together.

A consultation of two trustees meeting by themselves, without the presence and advice of the third, can result in nothing which can be regarded as the action of the board, unless the third trustee has been regularly notified of a meeting, and continues absent after his colleagues have waited a reasonable time for his attendance.

The trustees cannot delegate any discretionary power to a third person to execute the decision to which they may have arrived; still less can any one of them do so, although they may doubtless employ the services of a messenger to convey to a proposed teacher intelligence of a positive and unconditional determination; but this for the sake of cer-

tainty, and to preserve the evidence of the matter, should be reduced to writing and authenticated by the signatures of a majority.

It results in this case that without reference to who may be the legal trustees, none of them have contracted with any teacher in a manner rendering their acts obligatory upon the district. Whether they have rendered themselves personally responsible to the proposed teacher is a different question, which it is not necessary now to consider.

The principles herein stated will guide the trustees in contracting with a teacher; any two of them may fix the time and place of a meeting for the purpose of acting upon this subject, giving the third trustee not less than forty-eight hours' notice of the time and place fixed upon, and the object of the meeting.

They should examine the certificates of such teachers as may be proposed, and receive from them written propositions specifying the period for which they offer to teach, the amount of their salary, and the manner in which they are to be paid; and should make and sign a written memorandum—indorsed upon the written proposition which may be accepted, or repeating it in terms which will identify it—of their action in the premises, filing the same with the district clerk.

This appeal is sustained.

Per V. M. Rice, February 23. 1855.

An annual meeting appointed for the 11th July having been noticed for the 10th, but adjourned to the 11th for the transaction of business, held to be legal.
An estimate of expenditures must be submitted to vote, item by item.
An item "for sexton, $50" held to be illegal, being for an officer and purpose unknown to the law.

Where notice was given of an annual meeting to be held on the 10th of July, and, it being doubtful whether the last preceding annual meeting had not fixed the 11th day of July for that purpose, the meeting was adjourned to the latter day without the transaction of any business except the appointment of a chairman, it was held that the meeting of the 11th was regular and its proceedings valid, whether the 10th or the 11th was the true time appointed for the annual meeting.

It was also held that, whether the chairman elected on the 10th had or had not the right to preside on the 11th by virtue of such election, the acquiescence of the voters in his presidency was equivalent to a new election.

The trustees having presented an estimate for several heads of expenditure, amounting in the aggregate to $1800.00, and the vote having been taken thereupon by asking each inhabitant when he deposited his ballot for district officers whether he voted "tax" or "no tax," without in any other manner submitting the propriety of the items severally, it was held that the tax payers have the right, not only to fix the amount of their contributions but to specify the precise object to which every part thereof should be appropriated. The question should be submitted to them in such a form that every one may have the opportunity of offering amendments increasing or diminishing the amount to be appropriated to any of the enumerated objects, or of striking out. The proceedings not

having been conducted in such a way as substantially to preserve this right, but on the contrary apparently to subject the voters to the dilemma of voting for the estimate as an entire proposition or voting against every part of it, they were held irregular, and were annulled.

One of the items in the estimate being "for sexton, $50," it was held that the term sexton being unknown to the law as the designation of any district officer, the duties expected of him ought to have been so defined by the resolution as to show upon its face an intention to appropriate the money for services, like cleaning the school-house, making fires, &c., which are legitimate objects of taxation. It is not competent to a district meeting to create a new office having a salary attached to it, though it is competent to vote compensation for services, not incumbent upon the recognized district officers, but which are proper objects of expenditure.

Per E. P. Smith, Dep. Supt., October 2, 1855.

The power to admit to the district schools non-resident pupils is vested by statute in the trustees exclusively.

The inhabitants of District No. 1, Elba, at their annual meeting, September 4, 1855, passed a resolution to exclude non-resident children from the district school. An appeal was brought.

So much of the resolution as assumes to close the school against pupils from other districts is unauthorized. The trustees are invested with the power to admit such pupils by the express terms of the statute. It is their duty to prescribe the conditions of admission, and they ought to be such as to indemnify the district against any increased expense resulting from the attendance of non-residents. Proper security, moreover, ought to be taken in advance for the payment of any bills for tuition, to which such pupils may be subjected, as they cannot be collected upon a rate bill or by warrant.

Per E. P. Smith, Dep. Supt., October 20, 1855.

In making out a tax list, all the trustees must be consulted and act together.

Two of the trustees of District No. 1, Hornby, Steuben county, made out a tax list, without notifying or consulting with the third. The other trustee and Mr. Chalion Headley appealed, and asked that the said tax list be set aside, without pointing out any error or alleging any special grievance.

It is a clear and undoubted principle that the public have the right to the counsel and service of all the members of a board of trustees, and of every other tribunal, in all their doings which involve the exercise of discretion and judgment. The making out of a tax list is of this character. The trustees have to determine who are taxable inhabitants, and for what amount they shall be respectively assessed. It is true that, upon examination, they may ascertain that the taxable inhabitants of their district are the same persons and no other than those enumerated in the last completed town assessment roll, and that their property respectively remains, without any variation, as it did at the time such roll

was completed. That determination having been reached, the duty of copying so much of the assessment roll as relates to the inhabitants and property of their district is a purely clerical one, which may as well be discharged by one trustee as by three. It is, however, always a preliminary question, whether such be the fact, and the public have an interest that each of the trustees should be heard upon this question. A trustee who is absent might know and be able to show his colleagues that a particular inhabitant had received a large accession to his personal property, and thus reduce the contribution of every other tax payer.

The appeal is therefore sustained and the proceedings of the trustees declared irregular.

Per E. P. Smith, Dep. Supt., November 8, 1855.

The town clerk and supervisor have no power to review an order to alter a school district.

The town superintendent of Bolton had divided District No. 5, in said town, without the consent of the trustees. The latter applied to the town clerk and supervisor to review the order for such division, and from their refusal brought an appeal to the Superintendent of Public Instruction.

The supervisor and town clerk were correct in holding that they had no jurisdiction to review an order made by the town superintendent. The statute provides that these officers may, upon application of the trustees, associate themselves with the superintendent in determining upon a proposed alteration of a school district. It is implied, from this provision, that the trustees ought to have such notice of a contemplated alteration as would enable them to exercise their right in this respect. The statute, however, does not prescribe such notice or regulate the manner in which it shall be given; in fact, the trustees might themselves desire an alteration which they knew the superintendent to regard as inexpedient, and it is obvious that, in such case, it would devolve upon them to give notice to him and not to expect one. The spirit of the statute is satisfied whenever it appears in any way that the trustees have had the opportunity of availing themselves of the counsel of the supervisor and clerk, instead of trusting the matter to the unaided judgment of the superintendent.

In this case it clearly appears, indeed it is not denied, that previous to the making of the order in question, the supervisor, town clerk and superintendent were assembled upon an informal call of the inhabitants to consider the subject of an alteration; that the trustees were present and had their attention distinctly called to the fact that the town clerk and supervisor could act only on their application, and that they stood mute. The objection comes with an exceedingly bad grace from them, that they have been deprived of the opportunity to do that which they had refused to do when it was in their power. It is entitled to no weight whatever.

Per V. M. Rice, December 1, 1855.

A candidate for a teacher's certificate should be examined as to learning, morals and ability to teach.

When a candidate is refused a certificate on the alleged ground of "feelings of dissatisfaction on the part of some of the patrons of the school," a new examination will be ordered.

The town superintendent of Burns, Allegany county, refused Miss Jane E. Gilbert a certificate of qualification as a teacher, from which refusal she appealed.

The evidence in this case renders it exceedingly difficult to ascertain precisely upon what grounds Miss Gilbert was refused a certificate. It tends to show that the superintendent expressed himself satisfied with her education and literary acquirements. If he entertained doubts as to her capacity to impart instruction, the testimony fails to show that he took proper measures, by visiting her school or otherwise, to arrive at an intelligent conclusion on this point. In a letter to her, he referred to "feelings of dissatisfaction on the part of the patrons of the school," as having been considered by him in arriving at his determination to withhold a certificate. Such feelings or opinions were no proper guide to the superintendent, and should have had no other effect than to induce greater care to examine the foundation of them for himself, and decide upon his own knowledge and responsibility. Their existence may be a proper element of consideration, in determining the trustees of a particular district to forego the services of a qualified teacher, but they are no test of competency, and should not have the effect (as they do, if adopted by the superintendent) of excluding a teacher from every district in the town. It follows, that no good reason has been shown on the part of the superintendent for withholding the certificate. On the other hand, it is possible that his conclusion is correct, although founded upon insufficient evidence; and there is not such affirmative testimony of Miss Gilbert's entire fitness to teach, before the department, as to warrant it in ordering the superintendent to certify to her qualifications. To justify this, it should have such knowledge as would induce the State Superintendent himself to grant a certificate.

The appeal can be sustained only so far as to relieve Miss Gilbert from the imputation that a valid judgment has been passed against her qualifications. Perhaps this condition of things should be satisfactory, as she is entitled, of course, to an examination in any other town where she may be a candidate for employment as an instructress. If, however, she is still desirous to act as a teacher in the town of Burns, she may present herself for examination before Wm. W. Payne, late town superintendent of Burns, Samuel W. Swaine, of Swainsville, and any other of the former superintendents of Burns whom those gentlemen (who are hereby requested to act in the premises) may select. They will, in case of their acceptance of this commission, appoint a time and place for such examination, and cause reasonable notice thereof to be given to Mr. Whitney, that he may attend the same, if so disposed. All further directions are reserved until the coming in of the report of such committee, or further order.

Per V. M. Rice, December 7, 1855.

When a district has been altered, the site of the school-house may be changed by a vote of the majority of those present at the meeting.
The statute confers power to vote a tax to purchase a site or build a school-house at any meeting, although no notice may have been given of such intention.
Due notice of a meeting will be presumed, unless the contrary be shown.

A special meeting of Joint District No. 9, of Manheim, Herkimer county, and Oppenheim, Fulton county, was held December 19, 1854, and a vote was passed to change the site of the school-house. The meeting then adjourned to receive propositions. On the 23d day of June, 1855, a new site was designated, and at a subsequent adjourned meeting, an adjournment to the 2d Tuesday of October, 1856, was carried.

The trustees, however, called a special meeting for December 4, 1855, at which a tax of $450.00 was raised for purchasing the new site, $1000.00 for building a new school-house, and $200.00 for wood-house and privies. The certificate of the town superintendent, that $1200.00 was necessary for the house and outhouses, had been given.

The appellant raised the following points:

1. That the school-house site was illegally changed, no consent of the town superintendent having been obtained.

It might suffice to say that no such point was made in the appeal; but it is conclusively met by the reply of the trustees, which shows that the district has undergone repeated alterations since the erection of the school-house. No consent of the superintendent was necessary to authorize the fixing of a new site by a majority of the votes of those present and voting.

2. That a meeting which had under consideration the same matters as those brought before the meeting of December 4, 1855, having adjourned to a future day, the inhabitants were in the mean time incompetent to act upon them.

The answer is this, that the trustees are authorized to call a special meeting "whenever they shall deem it necessary and proper." No resolution of any meeting can deprive them of this power. The inhabitants assembled under such call are then "lawfully assembled." And the statute confers upon them, when lawfully assembled at any district meeting, the power to vote a tax for the purchase of a site and for the building of a school-house, and the necessary appendages. As the statute authorizes such a vote, and also a vote to sell a former site (provided only that the site shall have been legally changed "at any district meeting"), it clearly dispenses with the necessity of any special notice as a condition precedent of its jurisdiction. It would be another and different question, if there were any pretense that the voters were actually and designedly surprised by the unexpected introduction of so important a subject. There is no ground for such an allegation in this case.

3. The appellant objects, that it does not appear by the return of the district clerk, or otherwise, that the legal voters of the district, or any of them, were duly notified of such meeting. The burden of proof on this point rests on the appellant. The presumption always is that public

officers have done their duty. This presumption is supported in this case by the express statement that one voter received no notice, for it implies that no other failure to give notice could be alleged. Those who attended certainly had notice, and the omission in a solitary instance, is not averred to have been willful or fraudulent.

The proceedings were legal and regular.

Per V. M. Rice, February 6, 1856.

A tax by installments cannot be raised for any other purpose than "for building, hiring or purchasing a school-house," and then the tax cannot be raised by installments, unless it exceeds $400.00.

District No. 3, Berlin, Rensselaer county, at a meeting held December 20, 1855, voted to repair their school-house, build privy and fence, and move the house, and that the tax for such purpose should be raised by two annual installments.

The law does not permit the vote of a tax to be raised by installments, for any other purpose than that of building, hiring or purchasing a school-house, and even in that case the tax must not be raised by installments unless it exceeds $400.00.

Per V. M. Rice, February 9, 1856.

A vote will not be set aside because of illegal votes, when they do not affect the result.

At the election of a trustee in District No. 2, Rochester, Ulster county, January 15, 1856, four illegal votes were cast for the successful candidate, who, however, had ten majority.

The reception of the four illegal votes did not affect the result, and the appeal must be dismissed.

Per E. P. Smith, Dep. Supt., February 28, 1856.

It is the duty of the trustees to employ a competent teacher, and have a school in their district at least six months in a year.
Trustees should not be teachers.

The trustees of District No. 8, Preston, Chenango county, had, for a long period neglected to employ a teacher, and no school had been kept in the district, except for a few days, by one of the trustees. They were requested, December 26, 1855, by all the taxable inhabitants of the district, to employ a teacher, but had neglected to do so.

An appeal from their neglect was taken and they failed to make a legal answer.

It is a matter of course, under the circumstances, that the appeal shall be sustained, and the trustees required to proceed without delay to engage a teacher who shall be in possession of a proper certificate of qualification before commencing his labors.

It is proper to remark, that while the employment of a trustee as teacher is nowhere prohibited, and his assumption of the task of instructing the school may, under some circumstances, be highly praiseworthy, yet

the practice is to be discouraged. The fact that the teacher is one of the board that employs him, and fixes his wages, necessarily gives room to a suspicion that he may have been able to make a contract more advantageous to himself and less advantageous to the district, than if some third party had been employed. Those who represent the public should never put themselves in a situation where their private interests may conflict with those of their constituents.

Per V. M. Rice, March 18, 1856.

Land worked under a contract, by which the lessee is to share in the produce thereof, is subject to taxation in the district where it is situated.

The appellant is the owner of lot No. 34, included in the boundaries of District No. 9, Wirt, Allegany county, and also of lot No. 26, which adjoins it, but is included within the boundaries of District No. 1, and is in the occupation of an inhabitant of District No. 1, holding under a lease, by which he renders a share of the produce to the appellant. The statute expressly provides that any person working land under a contract for a share of the produce of such land, shall be deemed the possessor, so far as to render him liable to taxation therefor, in the district where such land is situate. The trustees aver that the existence of such a lease never came to their knowledge until after the making out of the tax list. This is doubtless true, but they were bound to know the limits of their own district, and were bound at their peril not to impose a tax upon any one, in respect to land outside of their limits, unless it was in his actual possession, constituting a part of real property "partly within such district and partly in an adjoining district."

It is an anomaly that land lying in one district should, under any circumstances, be withdrawn from its liability to support the public burdens of such district, and made to contribute to those of another in which the owner may reside. The law is to be so construed as to restrict such cases within the narrowest possible limits.

The appeal is therefore sustained. The trustees must correct their tax list, by excluding therefrom the valuation of lot No. 26, and by assessing so much of the tax as is imposed upon the appellant, by reason of his ownership of such lot, on the taxable inhabitants of the district, in proportion to their respective valuations.

Per E. P. Smith, Dep. Supt., May 20, 1856.

Children of non-residents may be admitted to the district school upon such terms as may be agreed upon between their parents or guardians and the trustees. The contract for admission should be in writing, and the payment of tuition should be exacted in advance.

Joseph E. Walton, an inhabitant of District No. 9, Colesville, Broome county, applied to one of the trustees of District No. 4, in the same town, and received permission from him to send his children to their school, for the term commencing May, 1855, and ending March, 1856, "on the same conditions as though he had been a resident of said District

No. 4, to wit: He was to furnish his quota of fuel, and enjoy the benefit of the public money in said district." The children attended during the whole term without objection from either of the other trustees, or from any inhabitant of said District No. 4, and the appellant furnished his quota of fuel. The trustee who gave the permission having removed from the district, and the vacancy being filled by an election, the board, as now constituted, "refused to allow him to participate in the benefits of the public money." The appellant asks the interposition of this department in his behalf, and that the trustees may be directed to carry such agreement into effect, "by allowing me to participate in the benefits of the public money applicable to the payment of teachers' wages."

Schools are provided primarily for the children resident in the district. The statute declares that they are free to all residents over five and under twenty-one years of age, "as thereinafter provided," that is to say, free as far as the right to attend them is concerned, subject to the liability to contribute by rate bill as provided in § 6, to the payment of any balance of teachers' wages, after the application "of the amount apportioned to such district under the provisions of this act, *and other public moneys belonging to the district applicable to the payment of teachers' wages.*" This is the only provision in the act defining or limiting the freedom guaranteed to *persons residing in the district.* The two provisions must be regarded as co-extensive, and embracing only the same class of persons. It follows that residents, and none other than residents, are the subjects of a rate bill.

It is to be remarked that the sixth section discriminates between the amount apportioned to the district by the provisions of the act—that is, the money derived from the state treasury, to which in common parlance the meaning of the words "public moneys" is restricted—and "other public moneys belonging to the district applicable to the payment of teachers' wages." These words are broad enough to include, and are to be construed as including, not only the revenues of any permanent local funds, but any sums received for tuition from persons not liable to a rate bill. The latter are to be applied in reduction of the teachers' wages, before the amount can be ascertained for which a rate bill must be made upon the residents of the district. It follows, then, that the appellant is not subject to a rate bill, and, independent of an express contract, can have no interest in the question, whether the public money apportioned to a district to which he does not belong is large or small.

The first section of the act of April 12, 1851, provides that "persons not resident of a district may be admitted into the schools kept therein, with the approbation in writing of the trustees thereof or a majority of them." This provision is only declaratory of the law, as previously understood and expounded by this department. It is doubtless true that a teacher would be at liberty to exclude a pupil not residing in the district, until the written evidence of the assent of a majority of the trustees should be presented. As a matter of reasonable prudence, such permission ought undoubtedly to be put into writing, and should declare precisely the terms upon which it is granted.

In this case, however, no question arises from the absence of a written permission, because in the first place, the children were not excluded, and in the second, the terms of the agreement are admitted by both sides. It was the business of the trustees, if they disapproved the contract made by one of their number, to have excluded the children absolutely, or to have made a new contract as to the amount to be paid for their tuition. By their acquiescence and inaction they must be deemed to have known and ratified the arrangement made by their colleague, especially as they have received money, or its equivalent for fuel, in pursuance of that contract.

The proper mode for them would have been to have assented to the continuance of the children in school, upon the appellant entering into a written agreement to pay a definite sum in dollars and cents for their tuition; or, what is more proper, paying it in advance, that it might become at once and beyond contingency a part of "the public moneys belonging to the district." They could, and in strictness should, have fixed that sum without regard to the attendance or non-attendance of the children. They would have been well warranted in making it somewhat larger than the amount which was expected to be required from residents. Public policy demands that a parent should not be permitted to withdraw his children from contributing to the support of the school in his own district, without such strong motives as may reconcile him to an increased expense for their tuition. If he choose to send to what, as far as he is concerned, is a private school, he cannot complain if he is made to pay precisely as if he received no aid whatever from the public funds.

In this case the making out of the rate bill is to be regarded simply as a mode of computing the amount which the appellant has agreed to pay; and he must pay it, not because the trustees have authority to make a rate bill against him, but because he has agreed to pay whatever, upon that mode of computation, may be found to be due.

Per E. P. Smith, Dep. Supt., May 23, 1856.

The election of a trustee at an adjourned meeting valid.
If a trustee renders his annual account to an adjourned annual meeting, he will not be removed because it is unsatisfactory.

Mr. Isaac Tracy, one of the trustees of District No. 5, Allen, Allegany county, omitted to make his annual report to the annual meeting, October 1, 1855, but claims that one was submitted and made by the clerk at an adjourned meeting, October 2.

One of the trustees elected at the first meeting refused to serve, and at the adjourned meeting another was elected to fill the vacancy.

Mr. Tracy will not be removed because his account was not satisfactory. He is liable to a suit, hereafter, for any money that can be shown by that account, or otherwise, to have come into his hands, and which he cannot prove to have been legally expended or paid to a colleague or successor authorized to receive it. If, on the other hand, he entirely failed to render any account, he is liable to a penalty of $25.00, in addition to a judgment for any moneys proved to be in his hands.

The election of a trustee on the 2d day of October, must be held to have been valid and regular. Admitting that the meeting the previous evening adourned for the sole purpose of having the annual account of the trustees submitted, the adjourned meeting was nevertheless competent to fill any vacancy which might then exist in district offices. Such a vacancy was created by the refusal of Mr. Lincoln to serve.

Per E. P. Smith, Dep. Supt., May 31, 1856.

When the time for annual meeting is not fixed, a notice by the trustees specifying a day for the annual meeting is sufficient, and the proceedings at such meeting are legal.

It is lawful at any district meeting to pass a resolution, with the consent of the town superintendent (school commissioner), designating an additional site, and raising a tax to purchase it.

The consent of the commissioner need not be in writing.

At a district meeting held in District No. 8, Moreau, Saratoga county, held October 1, 1855, a tax of $125.00 was voted to purchase an additional site and to build a school-house thereon, and also of $12.00 for repairs of the old school-house, the assent of the town superintendent to the designation of the additional site having been obtained. At this meeting the appellant was elected trustee.

On the 29th day of October the appellant presented to his colleagues a tax list for the sums above mentioned, and requested them to meet with him for the purpose of examining and correcting the list, if corrections were necessary, and to unite with him in signing the warrant. From their refusal to meet with him or to execute the warrant this appeal is brought.

On the part of the respondents it is urged that the annual meeting of 1854, failed to adjourn to any particular time and place, and that the notice for a meeting did not specify the objects for which it was called.

If the time of the annual meeting in 1855 was not fixed at the meeting of 1854 (on which the evidence is conflicting), the trustees had the right to "appoint a day for the holding of the annual meeting," and this they did by subscribing a notice designating the 1st of October, 1855, as such day and causing the same to be posted. It is of no consequence that they may have supposed they were only specifying the day to which the meeting stood adjourned. The fact that they so supposed, and that it was the day on which the inhabitants had for years been accustomed to hold their annual meeting, only proves that the day appointed was the precise one on which the inhabitants were prepared to expect their annual assemblage, and upon which they were the least likely to absent themselves from a want of notice.

If an appeal had been taken from the proceedings of October 1, in proper time, the department would have been disposed to give considerable weight to the allegation that a portion of the voters had been surprised, and might have ordered a new meeting, to reconsider the subject notwithstanding those proceedings were entirely legal. It would have done this in the hope that those proceedings might have been affirmed

under circumstances depriving every tax payer of any ground for dissatisfaction.

When, however, those who objected to the proceedings instead of taking active measures to set them aside, wait till thirty days, and then rest upon the illegality of the meeting, they must be confined to the issue thus made.

As to the other question, regarding the site, the persons in favor of such new site, were under no obligations to give notice of their design to present such proposition, nor were they bound to consult the trustees in respect to it. Any person at any meeting lawfully assembled, had the right, without previous consultation with anybody, to propose such resolutions, and the meeting "by a majority of the votes of those present," and with the consent of the town superintendent, could lawfully designate an additional site, and lay a tax to purchase the same, and to build a house upon it.

The consent of the town superintendent is not required to be in writing, and there is no pretense in this case that he did not consent in fact. Indeed it appears from the papers that he had taken an active part in procuring a deed of the additional site, to be executed to the trustees of the district before the 1st of October. This of itself proves his consent, and is sufficient to support the vote, although it was very proper to put such consent in writing as was subsequently done.

The respondents are required to meet with the appellant and sign the tax list and warrant.

Per V. M. Rice, June 1, 1856.

The assessment roll of a town, as revised by the assessors and delivered to the supervisors, is complete so far as to bind the trustees in making out a tax list.

The trustees of Joint District No. 1, Gates and Chili, Monroe county, in making a tax list on the 15th day of October, 1855, adopted the valuations of the town assessment rolls for 1854. The rolls for 1855 had not then been revised by the supervisors, and as those of the two towns differed very materially in their valuations of real estate, the trustees considered it unjust to follow them until such revision. In this the trustees erred, and their tax list is consequently erroneous. It has been repeatedly decided by this department, and also by the supreme court, that when the assessment roll has been revised by the assessors and delivered to the supervisors, it becomes so far complete as to bind the trustees.

If the trustees of a joint district regard the valuations of the two town assessment rolls as not substantially just, as compared with each other so far as such district is concerned, they have the right to apply to the supervisors of the towns, parts of which are embraced within their school district, to determine the relative proportion of taxes that ought to be assessed upon the real property of the parts of such district so lying in different towns. (Sec. 72, chap. 480, Laws of 1847.)

They can resort to this remedy as well after as before the board of supervisors has revised and equalized the town assessment rolls.

The appeal is sustained, and the trustees authorized to amend their tax list, in accordance with law.

Per E. P. Smith, June 4, 1856.

Exemptions must be collected by tax and not by rate bill.

John Oliver appeals from a rate bill made by the trustees of District No. 6, Halfmoon, Saratoga county.

On the 15th day of April, 1855, the trustees were indebted to the teacher, for the term then ending, $56.00. The amount of public money applicable to such term, was $29.72, leaving a balance of $36.28 to be collected by rate bill. Instead of compelling the teacher to wait for the collection of the rate bill, they drew an order on the town superintendent for the whole amount of public money in his hands, $47.86. In other words, they advanced to the teacher $18.14 out of the public money applicable to the summer term, and replaced it by the rate bill, when collected. If there is anything objectionable in this measure, which it is not intended to intimate, Mr. Oliver is estopped from taking the objection, inasmuch as he shows that he himself (being then a trustee,) signed the order.

On the 15th of April, 1856, the trustees were indebted to their teacher $72.00, to pay which they apply, 1st, the public money of 1855, restored by the collection of the rate bill, $18.14; 2d, $10.62 (out of $49.22,) of the public money of the present year, and for the residue, $43.24, they have made out a rate bill and issued a warrant.

The replication of the appellant shows that the trustees have actually drawn an order on the town superintendent for $15.00, instead of $10.62. The difference corresponds precisely with the amount of exemptions in the last and present rate bills, which should be raised by tax.

There is no authority to collect it by rate bill, nor should the trustees obtain an advance of it from the public money, through an order drawn professedly for teachers' wages. They are, therefore, directed to deduct the sum of $5.12 ratably from the amount charged to each person not exempted in the rate bill.

Per V. M. Rice, June 13, 1856.

Any district meeting may elect an officer to fill an existing vacancy, although thirty days may have elapsed since its occurrence.

The appeal was served June 11, 1856, upon R. S. Scott, town superintendent, and no answer has been made. It appears that Alexander Fenton, a trustee in Joint District No. 9, in Middletown and Shandaken, removed therefrom about the 1st of April, 1856. On the 28th day of May, 1856, a special meeting was held at which William Jones was chosen to fill the vacancy. The town superintendent, with a full knowledge of such election, appointed John Newton to fill the vacancy, caused by the removal of Fenton.

The inhabitants, when lawfully assembled at any district meeting, may choose district officers to fill vacancies. (§ 62, chap. 480, Laws of 1847.)

By § 77, it is provided that in case a vacancy shall not be supplied by a district meeting within one month thereafter, the superintendent of the town may appoint any person residing in such district to supply such vacancy. This provision does not, however, in any way affect the right of the district to supply such vacancy by election, at any period prior to an appointment made by the town superintendent.

In this case Mr. William Jones having been elected at a special meeting of the inhabitants of the district, previous to the appointment of Mr. Newton, the action must be considered legal.

The order of the town superintendent of District No. 9, Middletown and Shandaken, is therefore void.

Per V. M. Rice, July 31, 1856.

INTRODUCTORY

TO THE

LAWS IN RELATION TO SCHOOLS.

By chap. 36 of the Laws of 1856, the legislature directed a revised edition of the laws in relation to schools to be prepared, and a copy to be furnished to each school district library of this state, in the same volume with a Digest of Decisions of the Superintendents of Common Schools, the preparation of which had been authorized by chap. 397 of the Laws of 1854. The law directs this volume to be entitled the "Code of Public Instruction," and that it be prepared, printed and distributed, under the direction of the Superintendent of Public Instruction.

No particular method of arranging or numbering the statutes having been prescribed, the plan has been to collect together those sections which related to the same subject, without strict regard to the place they may occupy in the Session Laws, but with such a general adherence to the arrangement of the revision of the school laws, in 1847, as was consistent with that leading purpose. The sections are numbered in the order which they assume under this arrangement; and, at the end of each section, inclosed within brackets, a reference is given to the original statute from which it was taken, indicating the original number of the section, and also to every subsequent statute by which it has been amended or modified.

No liberty has been taken with the text of the statutes, but they have been printed precisely in the words of their enactment, either as originally passed or as amended by the legislature; except that where subsequent statutes have rendered it necessary to substitute other words for those contained in the law—as school commissioner or supervisor, in the place of town superintendent—the words thus substituted have been inclosed in brackets, and the authority for the interpolation has been

cited at the end of the section or in the comment which follows it. The means are thus furnished to the reader of distinguishing between the authentic language of the legislature and the opinion of the compiler as to the effect of its enactments.

It was necessary to study the utmost brevity in the comments upon the various sections. An unavoidable result will be, that to the careless reader many questions may appear to have been overlooked, for which an answer will be found upon more deliberate examination. In order to reach the meaning of a statute, *every* word must be pondered, as if special attention were invited to it by the display of italic type, and by the warning that the word could not be omitted, or any other word whatever substituted in its place, without perverting the intention of the law makers. It would be presumptuous to ask the same minute consideration of the comments; but the school officers, for whose instruction they were prepared, may be assured that a laborious effort has been made to anticipate every question they can have occasion to ask, and to furnish all the information that is practicable.

There are occasional references, in the comments, to the volume of Decisions of the State Superintendents, published in 1837 by Superintendent Dix, under the authority of the legislature. It is cited as *Com. School Dec.* The references to judicial decisions are for the the most part to those made by the courts of this state. Where the reports of other states or of England are cited, the fact is usually indicated by giving the abbreviation for the name of the state, with that of the reporter.

STATUTES RELATING TO COMMON SCHOOLS.

OF THE POWERS AND DUTIES OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

No. 1. There shall be chosen by joint ballot of the senate and assembly, on the first Tuesday in April next, and every third year thereafter, and as often as a vacancy shall occur in said office, a State Superintendent of Public Instruction, who shall hold his office for three years, and shall be invested with all the powers, perform all the duties, and be subject to all the responsibilities now conferred or imposed by law upon the Secretary of State in his capacity of Superintendent of Common Schools. (*Sec.* 1, *chap.* 97 *of* 1854, *passed March* 30, 1854.)

No. 2. The superintendent, so appointed, shall enter immediately upon the discharge of his duties, and shall be assigned suitable and convenient rooms in the state hall, to which all books, papers and documents now in the office of the Secretary of State, and pertaining to the common school department, shall be transferred. He shall receive an annual salary of two thousand five hundred dollars, payable quarterly by the treasurer on the warrant of the comptroller, and shall have power to appoint a deputy and as many clerks, not exceeding three, as he may deem necessary for the transaction of the business of the department; but the compensation of such deputy and clerks shall not exceed three thousand dollars in any one year, and shall be payable monthly by the treasurer on the warrant of the comptroller and the certificate of the superintendent. (*Sec.* 2, *chap.* 97 *of* 1854.)

No. 3. It shall be the duty of the State Superintendent, as soon as may be practicable after the commencement of his official term, to devise a seal, with suitable inscriptions and device, a description of which, together with an impression thereof, shall be filed in the office of the Secretary of State, which shall thereafter be the official seal of the said superintendent, and such seal may be renewed from time to time, as often as may be necessary; copies of all papers deposited or filed in the office of said superintendent, and all acts, orders and decisions made by him, may be authenticated under such seal, and when so authenticated, shall be evidence equally and in like manner with the original. (*Sec.* 3, *chap.* 97 *of* 1854.)

Chap. 129 of 1838 provides that no "record, whereof a transcript duly certified may by law be read in evidence, shall be removed by virtue of any subpœna *duces tecum* from the proper office in which such record shall be kept, * * * * unless by order of some court of record, made in open court, and entered in the minutes thereof, which order shall specify that the production of such record instead of such transcript is necessary."

The Revised Statutes, sec. 59, title 3, chap. 7, part 3, provide that "whenever a certified copy of any affidavit, record, document or other paper is declared by law to be evidence, such copy shall be certified, by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom and of the whole of such original; and if such officer have any official seal by law, such certificate shall be attested by such seal." The 61st section of the same title provides that "in all cases, where the seal of any court or of any public officer shall be authorized or required by law, the same may be affixed by making an impression directly on the paper, which shall be as valid as if made on a wafer or on wax."

No. 4. It shall be the duty of the State Superintendent to visit, as often as may be practicable, such and so many of the common schools, academies and other literary institutions of the state as he may deem expedient, to inquire into the course of instruction, management and discipline of such institutions, and to report the results of such visitation and inspection annually to the legislature, with such recommendations and

suggestions as he may deem suitable. (*Sec.* 4. *chap.* 97 *of* 1854.)

The Revised Statutes, sec. 1, title 2, chap. 15, part 1, declared it the duty of the superintendent of common schools "to prepare and submit an annual report to the legislature, containing,

1. A statement of the condition of the common schools of the state.
2. Estimates and accounts of expenditures of the school moneys.
3. Plans for the improvement and management of the common school fund, and for the better organization of the common schools; and
4. All such matters relating to his office and to the common schools as he shall deem expedient to communicate.

Chap. 350 of 1847, in relation to reports of state officers, requires them (including the superintendent of common schools) "to complete their several annual reports for the previous fiscal year, before the expiration of the current calendar year, and cause the same to be presented to the legislature immediately after the commencement of its next annual session." It also requires them to embrace in said annual reports a true account, so far as the same is practicable, of the funds and accounts of which each of said officers is in charge, to the termination of the current calendar year."

No. 5. The State Superintendent shall be, *ex-officio*, a member of the board of regents of the university, and chairman of the executive committee of the board of regents of the State Normal School. (*Sec.* 5, *chap.* 97 *of* 1854.)

No. 6. The superintendent of [Public Instruction] may appoint such and so many persons as he shall from time to time deem necessary, to visit and examine into the condition of the common schools in the county where such persons may reside, and report to the superintendent on all such matters relating to the condition of such schools, and the means of improving them, as he shall prescribe; but no allowance or compensation shall be made to the said visitors for such services. (*Sec.* 8, *chap.* 330 *of* 1839. *The words "public instruction" substituted for "common schools, in conformity to No.* 1 *of this compilation.*)

No. 7. The Superintendent of [Public Instruction], on such evidence as may be satisfactory to him, may grant certificates of qualification, under his hand and seal of office, which shall

be evidence that the holder of such certificate is well qualified in respect to moral character, learning and ability to teach any district school within this state, which certificate shall be valid until duly revoked by the superintendent. (*Sec.* 10, *chap.* 133 *of* 1843. *The words "public instruction" substituted for "common schools," in conformity to No.* 1 *of this compilation.*)

No. 8. Whenever it shall be satisfactorily proven to the State Superintendent that any county or town superintendent or other school officer has embezzled the public money, or any money coming into his hands for school purposes, or has been guilty of the willful violation of any law or neglect of any duty, or of disobeying any decision, order or regulation of the Department of [Public Instruction], the State Superintendent is hereby authorized to remove such officer from such office, by an order under the seal of office of the [Superintendent of Public Instruction]. (*Sec.* 15, *chap.* 382 *of* 1849, *substituting "public instruction" for "common schools," in conformity to No.* 1, *and "Superintendent of Public Instruction" for "secretary of state," in conformity to No.* 3 *of this compilation.*)

When it becomes necessary to ask the removal of a school officer, under the foregoing section, the following practice must be pursued: An affidavit or affidavits must be prepared and duly verified before some officer authorized to administer oaths, charging him with one or more of the offenses of which he is supposed to have been guilty, and which are above enumerated; as with having "embezzled money coming to his hands for school purposes," or with the willful neglect of some specified duty, or with disobeying some decision or order of the Department of Public Instruction, setting out the date of such order and its requisition in words or in substance. The affidavit, after distinctly stating the *charge*, should proceed with a specification of the facts by which it is established, which must be set forth with such certainty as to time, place, &c., as to furnish the officer with precise information as to what he is expected to meet, and to enable him to look for repelling testimony. After being verified, a copy of the affidavits, including the *jurat* or certificate of the officer administering the oath, must be served upon the officer whose removal is sought, together with a notice of the application, which may be substantially in the following form:

SIR—Take notice that the affidavits, with copies of which you are herewith served, will be presented to the Superintendent of Public Instruction at Albany, and application thereupon made for your

removal from the office of trustee of Joint District No. , of Shandaken, in Delaware county, and Denning, in Ulster county; and that you are required to transmit your answer to such application, duly verified, to the Department of Public Instruction within ten days after the service hereof, or the charges contained in such affidavits will be deemed to be admitted by you.

Your obt. servt.,
A. B. (Post-Office Address),
Port Jervis, Delaware Co.

A copy of this notice, together with an *affidavit* proving the service thereof and of the affidavits therein referred to, and the date and manner of such service, must be transmitted, with the original affidavits to the Department of Public Instruction. No fact, although otherwise known to the department, will be taken into consideration, nor will any paper be read or referred to, in disposing of the case, unless evidence is furnished that a copy of such paper has been served upon the party against whom the complaint is made. He cannot be prejudiced by any statement which he has not been called upon to answer.

The form of the notice above given indicates the course of the respondent. He is to transmit his sworn answer, together with the affidavits of other persons, if he deems them necessary, to the department within ten days. If for any reason, as the absence of material witnesses, he is unable to complete his defense in that time, he should before its expiration transmit his own answer duly verified, with a statement, under oath, of the facts which render it necessary that the time to procure further evidence should be extended, and stating the earliest day at which he expects to be able to obtain such evidence. If a probable defense appears from his answer, and the application for further time is reasonable, an order will be made granting it.

Both parties should have their affidavits, &c., legibly written upon foolscap paper, if practicable, and upon the same sheet or continuous sheets, written on both sides, and fastened together in the manner of legal pleadings, and not upon separate scraps of paper. They should be endorsed with a title, indicating the nature of the application, and the district, town and county where the matter arose, together with the *post-office address* of the person transmitting them. Though these may appear trifling minutiæ, the neglect of them produces great embarrassment and delay in a public office which is burdened with a very extensive correspondence.

No. 9. The Superintendent of Public Instruction shall be charged with providing the means of education for all the Indian children in the state. He shall cause to be ascertained the condition of the various bands in the state, in respect to education; he shall establish schools in such places and of such character and description as he shall deem necessary; he shall employ superintendents for such schools, and shall, with the concurrence of the comptroller and secretary of state, cause to be erected, where necessary, convenient buildings for their accommodation. (*Sec.* 1, *chap.* 71 *of* 1856.)

No. 10. In the discharge of the duties imposed by this act, the said superintendent shall endeavor to secure the coöperation of all the several bands of Indians, and for this purpose shall visit, by himself or his authorized agent, all the reservations where they reside, lay the matter before them in public assembly, inviting them to assist either by appropriating their public moneys to this object or by setting apart lands and erecting suitable buildings, or by furnishing labor or materials for such buildings, or in any other way which he or they may suggest as most effectual for the promotion of this object. (*Sec.* 2, *chap.* 71 *of* 1856.)

No. 11. In any contract which may be entered into with the said Indians, for the use or occupancy of any land for school grounds, sites or buildings, care shall be taken to protect the title of the Indians to their lands, and to reserve to the state the right to remove or otherwise dispose of all improvements made at the expense of the state. (*Sec.* 3, *chap.* 71 *of* 1856.)

No. 12. The Indian children in the state, between the ages of four and twenty-one years, shall be entitled to draw public money the same as white children. The superintendent shall cause an annual enumeration of said Indian children to be made, and shall see that the public money to which they are ratably entitled is devoted exclusively to their education. (*Sec.* 4, *chap.* 71 *of* 1856.)

No. 13. To carry into effect the provisions of this act, the sum of five thousand dollars is hereby appropriated out of the surplus income of the United States deposit fund, to be paid by the treasurer, on the warrant of the comptroller.

from time to time, to the order of the Superintendent of Public Instruction. (*Sec.* 5, *chap.* 71 *of* 1856.)

No. 14. The superintendent shall take and file in his office vouchers and receipts for all the expenditures made under this act, subject to the inspection of the joint committee to examine the accounts of the auditor and treasurer, and shall annually report to the legislature all his doings by virtue of the authority vested in him; and for this purpose said superintendent may require full and detailed reports, in such form as he may prescribe, from those having the immediate supervision of any Indian schools in this state. (§ 6, *chap.* 71 *of* 1856.)

No. 15. The institution for the deaf and dumb in the city of New-York, and every other similar institution incorporated or to be incorporated in this state, shall be subject to the visitation of the Superintendent of [Public Instruction]. (*Rev. Stat., sec.* 1, *tit.* 3, *chap.* 15, *part* 1*st. The words "public instruction" substituted for "common schools," in conformity to No.* 1 *of this compilation.*)

No. 16. It shall be the duty of the superintendent, as such visitor:

1. To inquire from time to time into the expenditures of each institution and the systems of instruction pursued therein respectively;
2. To visit and inspect the schools belonging thereto, and the lodgings and accommodations of the pupils;
3. To ascertain, by a comparison with other similar institutions, whether any improvements in instruction and discipline can be made; and for that purpose to appoint from time to time suitable persons to visit the schools;
4. To suggest to the directors of such institution and to the legislature such improvements as he shall judge expedient;
5. To make an annual report to the legislature on all the matters before enumerated, and particularly as to the condition of the schools, the improvement of the pupils and their treatment in respect to board and lodging. (*Rev. Stat., sec.* 2, *tit.* 3, *chap.* 15, *part* 1*st.*)

No. 17. It shall be the duty of the overseers of the poor in each town to furnish the Superintendent of [Public Instruction] with a list of the deaf and dumb persons in their respective towns, so far as they can ascertain them, with such

particulars in relation to the condition of each as shall be prescribed by the said superintendent. (*Sec.* 1, *chap.* 223 *of* 1832 *The words "public instruction" substituted for "common schools," in conformity to No.* 1 *of this compilation.*)

No. 18. From the list thus obtained, the superintendent may select as state pupils such as are properly embraced within the provisions of the existing laws, and make such regulations and give such directions to parents and guardians, in relation to the admission of pupils at stated periods, as will remove the inconvenience of having pupils of the same class entering the school at different periods. (*Sec.* 2, *chap.* 223 *of* 1832.)

No. 19. Every indigent deaf and dumb person, resident of this state, between twelve and twenty-five years of age, whose parent or parents, or, if an orphan, whose nearest friend shall have been resident in this state for three years, and who may make application for that purpose, shall, until provision be made by law for his or her instruction in some other institution or school, be received into the New-York institution for the instruction of the deaf and dumb, provided his or her application for the purpose be first approved of by the Superintendent of Public Instruction. (*Sec.* 1, *chap.* 272 *of* 1854.)

Prior to the passage of this act the number of state pupils had been limited, and they were apportioned equally among the old senate districts, as established under the constitution of 1822. This restriction is now abrogated; but it is still necessary that the indigence of the applicant be established by the certificate of the overseers of the poor of the town wherein such deaf and dumb person shall reside, "to the inability of the parent, parents or guardian to pay for his or her board and tuition." In case the applicant is over twenty-one years of age, the overseers should certify to the inability of the candidate himself; and in case the parent, parents or guardian (or the applicant himself, if of full age) have the ability to pay any portion of the board and tuition, or for the clothing of a deaf and dumb person, the overseers of the poor are required to certify and state the amount. They are also required to state in their certificate that the parent or parents, or, if an orphan, the nearest friend of the deaf mute, have been resident in this state for three years. It is provided by sec. 3, chap. 244 of Laws of 1838, that "the supervisors of any county in this state, from which state pupils may be selected,

whose parents or guardians are unable to furnish them with suitable clothing, are hereby authorized and required, while such pupils are under instruction, to raise a sum of money for this purpose, not exceeding twenty dollars in any one year for each pupil, from said county."

No. 20. Each indigent pupil, so received into the institution aforesaid, shall be provided with board, lodging and tuition; and the directors of the institution shall receive for each pupil so provided for the sum of one hundred and fifty dollars per annum, in quarterly payments, to be paid by the treasurer of the state, on the warrant of the comptroller, to the treasurer of the said institution on his presenting a bill of the actual time and number of pupils attending the institution, and which bill shall be signed and verified by the oath of president and secretary of the institution. The regular term of instruction for such pupils shall be five years. The indigent pupils provided for in this act shall be designated state pupils, and all the existing provisions of law applicable to state pupils now in said institution shall apply to pupils herein provided for. (*Sec.* 2, *chap.* 272 *of* 1854.)

No. 21. It shall be lawful for the Superintendent of Public Instruction to continue at the said institution for a period not exceeding three years, for the purpose of pursuing a course of studies in the higher branches of learning, such pupils, not exceeding twelve in number, as may have completed their full term of instruction, and who may be recommended by the directors of said institution. (*Sec.* 3, *chap.* 272 *of* 1854.)

No. 22. The Superintendent of [Public Instruction] is hereby authorized to visit and inspect the New-York institution for the blind, in all its departments, and to report to the legislature on such matters and things relating to the interests of said institution as he may deem necessary. (*Sec.* 6, *chap.* 200 *of* 1839. *The words "public instruction" substituted for "common schools," in accordance with No.* 1 *of this compilation.*)

No. 23. * * * * * And it is hereby declared that every indigent blind person, resident of this state, between twelve and twenty-five years of age, whose parent or parents, or, if an orphan, whose nearest friend shall have been a resident in this state, and who may make application for that purpose, shall, until provision be made by law for his or her instruction

in some other institution or school, be received into said institution for the blind and be instructed in literary or school education, and in some trade or employment now or hereafter to be taught and carried on in said institution, provided his or her application be first approved of by the Superintendent of Public Instruction. (*Part of sec.* 1, *chap.* 539 [*Supply Bill*], *of* 1855, *Session Laws*, *p.* 1018,)

Chap. 200 of 1839, authorized the managers of the New-York institution for the blind, to receive from each of the old senate districts, as established under the constitution of 1822, eight indigent blind persons in addition to those theretofore provided for by the state, viz., four from each senate district, under chap. 316 of 1834, and four, in addition from each district, under chap. 293 of 1836. The number was thus raised to sixteen from each of the eight former senate districts, or one hundred and twenty-eight in all. They were, in virtue of those acts, to be received "between *eight* and twenty-five years of age," "in like manner and at the like expense to the state as is provided by law for the indigent deaf and dumb." The act of 1839 provides that "all of said pupils shall be instructed for a period not exceeding five years in such studies or employments as now are or may hereafter be taught or carried on in said institution; but when it may be advantageous to prolong the time of instruction of any one or more of the pupils now in said institution, or of those which may hereafter be received therein, the managers may, in their discretion, retain them for a term not exceeding two years beyond that now provided for by law; first obtaining for that purpose the approbation of the Superintendent" of [Public Instruction].

The supervisors of any county in the state from which state pupils may be sent, whose parents or guardians are unable to furnish them with suitable clothing, are required by sec. 5, chap. 200 of 1839, while such pupils are under instruction, to raise a sum of money for this purpose, not exceeding $20 in any one year for each pupil from said county.

These provisions have not been expressly repealed, and it may be a question how far the act of 1855 is to be regarded as modifying them. May not indigent blind children, to the number of sixteen from each of the former senate districts, still be admitted as state pupils, although between the ages of eight and twelve years? It will be observed that the act of 1855 does not limit the term of instruction, and does not pledge the state to any particular rate of compensation for the

board and instruction of the pupils. Up to the number of one hundred and twenty-eight, the term of instruction and the allowance to the institution, are fixed by previous laws.

No. 24. The superintendent shall prepare suitable forms and regulations for making all reports, and conducting all necessary proceedings under this title, and shall cause the same, with such instructions as he shall deem necessary and proper for the better organization and government of common schools, to be transmitted to the officers required to execute the provisions of this title throughout the state. (*Sec.* 9, *title* 2, *chap.* 15, *part* 1 *of the Revised Statutes.*)

The title of the Revised Statutes above referred to, is that "of common schools" embodying all the provisions in respect to their organization and management, and which, as modified by subsequent legislation, are collated in this volume. The succeeding section directed the superintendent to "cause so many copies of the first six articles of this title, with the forms, regulations and instructions prepared by him thereto annexed, to be from time to time printed and distributed among the several school districts of the state, as he shall deem the public good to require;" and sec. 11 provided that "all moneys reasonably expended by him in the execution of his duties, shall, upon due proof, be allowed to him by the comptroller, and be paid out of the treasury." These provisions, however, are rendered substantially nugatory by sec. 8, art. 7, of the constitution of 1846.

"No moneys shall ever be paid out of the treasury of this state or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payment be made within two years next after the passage of such an appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

OF THE APPORTIONMENT OF SCHOOL MONEYS.

No. 25. There shall hereafter be raised by tax, in the present and each succeeding year, upon the real and personal estate of each county within the state, three-fourths of a mill upon each and every dollar of the valuation of such estate, for the support of common schools in this state, to be apportioned and distributed by the Superintendent of Public Instruction, in the same manner as the proceeds of the state tax of eight hundred thousand dollars, in lieu of which this tax is substituted, and now required to be apportioned and distributed except as hereinafter provided. The board of supervisors of each county shall assess such amount upon the real and personal estate of such county, in the manner provided by law for the assessment and collection of taxes; and shall annually, as soon as the aggregate valuation of the real and personal estate of their county shall be ascertained, give immediate notice thereof to the Superintendent of Public Instruction. No clerk of any board of supervisors, or other person who may make out the tax list or assessment rolls of any town, shall omit to include and apportion among the moneys to be raised thereby, the amount hereby required to be raised for the support of schools, by reason of the omission of the board of supervisors to pass a resolution for that purpose. (*Sec.* 1, *chap.* 180 *of* 1856.)

In addition to the proceeds of the state tax, there are annually apportioned and distributed for the support of common schools: 1st. The revenue of the common school fund, in accordance with sec. 2, title 4, chap. 9, part 1 of the Revised Statutes.

"There shall be annually distributed, as the revenue of the common school fund, and according to the apportionment of the superintendent of common schools then in force, the sum of one hundred thousand dollars for the support and encouragement of common schools, to be denominated 'school moneys;' and as often as such revenue shall be increased by the sum of ten thousand dollars, such increase shall be added to the sum to be distributed."

Under this provision, $145,000 of the revenue is annually apportioned. The revenue for the fiscal year ending September 30, 1855, was $143,127.73, and the capital at that date $2,457,520.86. The constitution provides that "the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appro-

priated to and made part of the capital of the said common school fund." The principal increase of the fund is derived from this source, nearly all the lands belonging to it having been sold.

2. One hundred and ten thousand dollars for teachers' wages, and $55,000 for district libraries, are also annually distributed from the income of the United States deposit fund. The appropriation of these sums was originally made by chap. 237 of 1838. That act, after making sundry appropriations of the income of the United States deposit fund for literary purposes, provided as follows:

"§ 10. The residue of the income aforesaid, not otherwise appropriated, shall be annually added to the capital of the common school fund; and the comptroller is hereby authorized and required to invest such surplus moneys in like manner as he is now authorized to invest the moneys of the common school fund."

In 1847, when the new constitution took effect, and also in 1849, the legislature in the acts appropriating the revenues of the literature and United States deposit funds, reënacted the provision assigning the unappropriated residue of the latter fund to the common school fund. This was apparently done to comply with the provision of the constitution, limiting the operation of a law appropriating money to two years from the date of its passage. It is believed, however, that a law merely designating the fund to which money is to be credited, when it reaches the treasury, does not come within that clause of the constitution, and that the above cited provision of the act of 1838 is still in force, although it has not been reënacted since 1849.

Chap. 382 of 1849, contains the following provision applicable to the surplus income of the deposit fund as to all other moneys received on account of the school fund.

"§ 13. Whenever any money is paid into the treasury of the state for or on account of the common school fund, it shall be the duty of the comptroller to credit the common school fund with interest on the sum so paid in, at the rate of six per cent per annum, for the time the same shall remain in the treasury."

No. 26. All the moneys received or appropriated by the provisions of this act shall be applied to the payment of teachers' wages exclusively. (*Sec.* 11, *chap.* 151 *of* 1851.)

This provision, it is declared by sec. 1, chap. 425 of 1851, "shall not be so construed as to prevent or prohibit the distribution and application of library money in the manner heretofore prescribed by law."

No. 27. Every commissioner chosen or elected in pursuance of this act, shall receive an annual salary of at least five hundred dollars, to be paid out of the income of the United States deposit fund, appropriated to this purpose or to the support of common schools, and it shall be the duty of the Superintendent of Public Instruction to apportion to each county, in his annual apportionment of the income of said fund thus appropriated, five hundred dollars for the salary of each commissioner of common schools in said county, created under authority of this act. (*Sec.* 12, *chap.* 179 *of* 1856.)

The commissioners referred to in the preceding section are the school commissioners appointed for each assembly district, or in certain counties for a section of an assembly district, under the act to provide for a more thorough supervision and inspection of common schools, passed April 12, 1856.

No. 28. The Superintendent of Public Instruction shall also apportion to each of the cities in this state, having, under special acts, a superintendent of common schools, or whose boards of education choose a clerk doing the duty of supervision under their direction, out of the income of the United States deposit fund appropriated for this purpose, or for the support of common schools, the sum of five hundred dollars for each member of assembly to which such city shall be entitled according to the unit of representation adopted by the legislature, to be paid into the city treasury, and expended as required by law for the support of schools. (*Sec.* 15, *chap.* 179 *of* 1856.)

No. 29. It shall be the duty of the State Superintendent of Public Instruction, on or before the first day of January of each and every year, after deducting any portion hereinbefore required to be apportioned for and on account of supervision, to apportion and divide one-third of the remainder of the income of the United States deposit fund appropriated by law for the support of schools, and one-third of all other moneys thus appropriated, among the several school districts and separate neighborhoods in this state, from which reports shall have been received, in accordance with law, in the following manner, viz: to each separate neighborhood belonging to a school district in some adjoining state, there shall be apportioned and paid a sum of money equal to thirty-three cents for each child in such neighborhood (between the ages of

four and twenty-one); but the sum so to be apportioned and paid to any such neighborhood, shall in no case exceed the sum of twenty-four dollars; and the residue of such one-third shall be apportioned and divided equally among the school districts; and the State Superintendent of Public Instruction shall, by proper regulations and instructions to be prescribed by him, provide for the payment of such moneys to the trustees of such separate neighborhoods and school districts. (*Sec.* 30, *chap.* 179 *of* 1856.)

Under the former system, the number of children in separate neighborhoods, and the number of school districts in the state to which an apportionment is to be made by the State Superintendent on the first day of January, 1857, would have to be ascertained from abstracts made by the school commissioners of the reports of trustees of school districts rendered between the 1st and 15th day of January, 1856, and containing the statistics of schools and teachers during the year 1855. Such a report must have been made and transmitted to the late town superintendent, in order to fulfill the condition that the district be one of those "from which reports shall have been received in accordance with law." It is to be observed that no discretion is vested in the State Superintendent to admit a district to a share in the equal apportionment of one-third of the public moneys, in case of a failure to make the legal report, whatever mitigating circumstances may exist to excuse the delinquency. The statute requires that the whole of the sum equally apportioned be divided among the districts from which reports have been received. This being done, the money is exhausted, and the quota of a non-reporting district cannot be obtained without a contribution *from every other district in the state;* which, even if it were practically feasible to collect, the superintendent has no authority to demand. This consideration enforces upon the trustees of districts the duty of making their annual report in all cases, notwithstanding they may be obliged to admit in their report that they have maintained school for a less period than six months, that they have employed unqualified teachers, or have in other respects failed to comply with the requisitions of law.

The very prevalent error which leads to numerous fruitless applications to the department for the restoration of a forfeited "district quota" (as, for the sake of brevity, the share of a district in the one-third of the public moneys equally distributed, will be denominated), arises from

overlooking the fact that the permission which the State Superintendent is authorized, by a subsequent section, to grant, is a permission to be included in the apportionment made by the school commissioners of the remaining two-thirds of the school moneys which are distributed to the counties and cities in proportion to their population. Such permission relates exclusively to what may, for the sake of convenient brevity, be denominated the "pupil quota"—the portion of the public money distributed to the county on the basis of its entire population, which a district is entitled to receive on its reapportionment by the school commissioners in proportion to the number of residents between the ages of four and twenty-one years.

It having been determined whether the district is or is not entitled to a "district quota," by seeing whether a report has been received therefrom in accordance with law and whether it has complied with the requisition of the next succeeding section, the amount of such quota is to be determined according to No. 31, to the remarks under which the reader is referred.

No. 30. Every district in this state in which a school shall have been taught by a qualified teacher for the time of six months, or by successive teachers, whose periods of actual instruction amount in the aggregate to six months, and no other, shall be enumerated for the purpose of the distribution of so much of the school money as shall be divided equally among the districts. (*Sec.* 2, *chap.* 180 *of* 1856.)

The statute is here imperative that no other district shall be enumerated, among those to which a "district quota" is apportioned, than those in which a school shall have been taught by a qualified teacher or teachers for the period of six months. The State Superintendent has no authority to overlook or excuse a delinquency in this particular, no matter what extenuating circumstances may be shown in palliation. It is essential that the teacher should possess a proper certificate of qualification during the whole period of his instruction, and it is therefore incumbent upon the trustees to require an actual production of the certificate, before entering into any contract with a candidate for the post of teacher in their school, that they may ascertain by its examination whether it is granted by the proper officer, is in due form, and has not expired by lapse of time.

The Revised Statutes, sec. 4, title 1, chap. 19, part 1, provide that "Whenever the term month is or shall be used in any statute, act, deed,

verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar and not a lunar month, unless otherwise expressed."

In accordance with this rule it is conceived that the period between the beginning and the ending of the term of instruction must actually include the full period of six calendar months, or, if there has been an intermediate vacation, that the two periods shall in the aggregate amount to six calendar months. This does not imply, however, that the teacher should actually devote one hundred and eighty-two days to instruction. The month of February, for example, may begin and terminate on Sunday, leaving but twenty-five secular days; one of these, the 22d, the birthday of Washington, is very generally observed as a public holiday; and, when so observed, a teacher is discharged from any obligation to teach school. There are also four Saturdays, on each of which he is entitled to a half holiday, or to the whole of the alternate ones, according to the custom of the district. The actual month's work would, in this case, be reduced to twenty-three days. The month of July, of thirty-one days, may include five Sundays and five Saturdays, besides the national holiday, the 4th. In this case the actual period of instruction would be but twenty-two days and a half. In both cases, however, the teacher would, unless a special contract to the contrary was made, be entitled to a full month's wages. The ordinary month's work for a teacher, in the absence of any special agreement to the contrary, is twenty-four days; but to comply with the above provision, in respect to the allowance of a "district quota," it is believed that the six months' work must extend through six calendar months.

No. 31. Every district school in which two or more qualified teachers are actually employed at the same time, for the period of six months or over, shall be enumerated as so many districts as there have been teachers thus employed during the year, whether any one or more of them had been continuously employed for the whole period of six months or not, providing the number of teachers actually employed shall have been at no time less than the number at which the district is enumerated. Pupils employed as monitors, or otherwise, shall not be deemed teachers for the purpose of such enumeration. (*Sec.* 3, *chap.* 180 *of* 1856.)

In order to entitle a district to the benefit of this provision, it will be necessary to show a strict compliance with the prescribed conditions.

Whether any further evidence than the annual report of the trustees will be required, it is now premature to determine. The statement of the report must be based upon these facts, or they must be made to appear by an affidavit of the trustees, transmitted to the department before the time of making the apportionment, viz:

1. That two or more teachers, each of whom possessed a legal certificate of qualification during the whole period which the trustees estimate as a part of the six months, have been actually employed in instructing the district school, at the same time, for the period of six months or over.

The instruction may be given in different rooms or in different buildings; for all the pupils within the district, under the tuition of teachers employed by the trustees in their official capacity, however dispersed, constitute but one school. This principle was settled, in respect to the mode of compensating teachers and the equality of rate bills, as long ago as 1826. (*See decision of Supt. Flagg, p.* 4, *Common Schoool Decision; do., p.* 56.)

It is not necessary that all or either of the teachers should have been continuously employed for the whole period of six months. Thus, two qualified teachers may be employed at the same time during three months in the spring; a vacation may intervene, and two other qualified teachers may be employed for three months in the summer or autumn. The provision, that "the number of teachers actually employed shall have been at *no time* less than the number at which the district is enumerated," must be construed as meaning at no time during the six months in which the stated number of teachers is alleged to have been employed. A construction which would apply the words *no time* to the whole year, would debar a district from a double quota, which, having employed but one teacher in the first four months of 1856, should have engaged two immediately after the passage of the act, and kept them continuously employed for the remaining eight months of the year. It was undoubtedly the intention of the legislature that no teacher should be counted twice, because he may have been employed twelve months, and that no device of *average* or of *equivalents* should be resorted to for the purpose of computing the number of teachers; for example, that three months' instruction by two teachers, and six months' additional instruction by one of them, should not be deemed as amounting to six months' employment of two teachers. Any interpretation which would give room for such modes of enumeration would afford an unjust advantage to the schools of the larger cities, in which numerous

teachers are employed, and which are kept open during the whole year, with brief intervals of vacation.

2. It must affirmatively appear that no one of the teachers referred to in the statement was a pupil, employed as a monitor or otherwise, during any portion of the period in which he is enumerated as a teacher.

The policy of the legislature, in the enactment of this section, was unquestionably to encourage the formation of large schools, classified in different departments, or separated where necessary in different buildings, in preference to the division of districts and the multiplication of feeble schools.

No. 32. It shall be the duty of the State Superintendent of Public Instruction, on or before the first day of January of each and every year, to apportion and divide the remaining two-thirds of the remainder specified in the preceding section (No. 27) among the several counties, according to population, as the same shall appear from the last preceding state or United States census; but in counties in which are situated cities having a special school act, he shall apportion to each city the part to which it shall be entitled, and to the remainder of the county the part to which it shall be entitled; and he shall certify such apportionment, and every other apportionment, to the county clerk of the county to which they shall be made, and to the school commissioner or school commissioners of such county:

(1.) And the school commissioner, or school commissioners jointly in counties having more than one commissioner, shall forthwith proceed to set apart, to each separate neighborhood and school district within his or their jurisdiction, the amount apportioned to each by the State Superintendent of Public Instruction;

(2.) The commissioner or commissioners shall then proceed to divide and apportion the balance of the public school moneys (apportioned according to population for the support of schools within his or their jurisdiction) to the separate neighborhoods, school districts and parts of school districts, joint with parts in any city or a town in an adjoining county, in proportion to the number of children in each (between the ages of four and twenty-one), as the same shall appear from the report of the trustees of the last preceding school year; and he or they shall specify, in such apportionment, the amount

apportioned to each for library purposes and the amount for teachers' wages;

(3.) But no moneys shall be apportioned or set apart by him or them to any separate neighborhood or school district or part of a district (joint with a part in any city, or with a part in a town in an adjoining county), unless it shall appear, from a report of the trustees thereof for the last preceding school year, that a public school was supported by the inhabitants thereof for at least six months during the year ending with the date of such report, by a duly qualified teacher, except by special permission of the State Superintendent of Public Instruction;

(4.) The commissioner or commissioners aforesaid shall then set apart, to each town within his or their jurisdiction, the money so set apart and apportioned by them to each separate neighborhood therein, to each school district the school-house of which is therein, and to each part of a joint district therein the school-house of which is located in a city or in a town in an adjoining county;

(5.) A certificate shall then be made by the commissioner or commissioners, showing the amount apportioned to each separate neighborhood, school district, and part of a district, joint as hereinbefore specified, within his or their jurisdiction, and it shall also show the towns in which they are respectively situated;

(6.) One copy of said certificate, signed by the commissioner or commissioners, shall be sent to the county treasurer, and one copy to the State Superintendent of Public Instruction, and to the supervisor of each town; the commissioner or commissioners shall certify the amount of school moneys, so apportioned, which he shall be entitled to receive from the county treasurer, and the portions thereof to be paid by him for library purposes and for teachers' wages to each district, separate neighborhood and part of a district (joint with a part in a city, or with any town in an adjoining county);

(7.) The supervisor shall forthwith make a copy of such certificate for his own use, and deposit the original in the office of the town clerk of his town, and the share of the several towns so apportioned shall be paid over to the supervisors on and after the first Tuesday of February of each year;

(8.) Sections four and five of the act entitled "An act to establish free schools throughout the state," passed April 12, 1851, are hereby repealed. (*Sec.* 31, *chap.* 179 *of* 1856.)

For the purpose of facilitating the examination of this long section it has been broken into clauses, separated so as to be typographically distinct and numbered, but otherwise conforming to the text and arrangement of the statute book.

The first clause relates to the duty of the State Superintendent in making the apportionment. It differs from his duty under the law, as it stood prior to 1856, in this, that the apportionment, instead of being made to *towns* and cities, is hereafter to be made to counties, and to such cities as are governed by special school laws. The practical difference resulting from this is, that under the sub-apportionment made by the school commissioner, each town, or rather the districts in each town, will receive, over and above their respective "district quotas," a sum of money proportioned, not to the aggregate population of the town as compared with that of the whole state, but to the number of persons between four and twenty-one years of age in each, as compared with the entire number of *such* persons in the county.

The apportionment by the superintendent is made in the following manner:

First. The amount to which each city and county is entitled for salaries of school commissioners, or, in the language of No. 27, "for and on account of supervision," is ascertained, and the aggregate of those sums is deducted from the $165,000 appropriated to schools out of the revenue of the United States deposit fund, unless a distinct appropriation for this purpose be made by the legislature.

Second. The sum of $55,000, part of the appropriation of $165,000 from the revenue of the United States deposit fund, is apportioned to the several counties and cities, in proportion to their population, for district libraries.

Third. The residue of the appropriation from the revenue of the United States deposit fund is added to the appropriation from the income of the school fund (now $145,000) and the proceeds of the three-quarter mill state tax, and of their gross sum one-third is apportioned to the several counties and cities of the state, as follows:

1. The whole number of children between four and twenty-one years of age belonging to all the separate neighborhoods of this state, attached to districts in adjoining states, is ascertained, and the product of that number, by thirty-three cents, is deducted from the one-third of the residue of public school money; the residue of such third is then apportioned as follows, viz:

2. The whole number of districts in the state, computed as directed in No. 31, is first ascertained, and the quotient, obtained by dividing the one-third above mentioned by the whole number of districts, is taken as the "district quota. It is then ascertained to what number of "district quotas" each district having its school-house in a county or city is entitled, and the multiple of such number, by the amount of a district quota, is assigned as the "apportionment, according to districts," of such city or county.

Fourth. The remaining two-thirds of the residue of public money is then apportioned to the respective counties and cities in proportion to their population, and is denominated, in the certificate, "apportionment according to population." It is only this sum that is subject to reapportionment by the school commissioners; and every special permission granted by the superintendent, to include a district in the apportionment of public moneys, relates only to its share in this sum, or what has been denominated its "pupil quota," and not to the district quota in any case, or to library quota unless specially mentioned.

The second clause of No. 32 declares the duty of the school commissioners with respect to the "apportionment according to districts," certified to them by the State Superintendent for their respective counties. This duty is to *assign* to each separate neighborhood and district the district quota which has already been apportioned to it by the superintendent; that is to say, to credit each separate neighborhood and district, having its school-house within their county, with its quota or quotas, according to the number of children between four and twenty-one years of age in the separate neighborhood, and according to the number of teachers employed at the same time for six months or over in the districts respectively. Inasmuch as the apportionment made by the superintendent must have been based upon a report furnished by the school commisssoner or his predecessor in office, a reference to that report will enable him to determine to which districts a double or larger quota has been apportioned, to which districts a single quota, and to which (in consequence of no report having been received from it, or of its having failed to have had a school taught by a qualified teacher for six months or over) none at all. If the records and papers of the school commissioners are properly kept, no difficulty will be found in ascertaining the respective quotas of the districts; and the requisite information will be furnished by the department, in cases which appear susceptible of doubt. In case, however, the commissioners find themselves unable to distribute the district quotas without applying for instructions

from the department, they should not on this account delay the apportionment of pupil quotas under the next clause, but make and transmit their certificates, and complete the same by a supplemental certificate, in respect to the district quota, as soon as possible afterwards. The supervisors should not be delayed, in obtaining from the county treasurer what moneys may be wanted for the immediate payment of teachers in their respective towns, by any delay in the commissioners making the apportionment according to pupils.

The third clause of No. 32 defines the duty of the school commissioners in apportioning the pupil and library quota to the respective districts within their jurisdiction. For this purpose they are to ascertain from the reports of the trustees of the last preceding school year the number of children between the ages of four and twenty-one years in each separate neighborhood, each district, and each part within their jurisdiction of a joint district, the remaining part or parts of which are situated in a city, or in some town or towns in an adjoining county.

It may happen that several children are twice enumerated in the reports of the trustees, being claimed as residents of two districts, and that the trustees have not yet been brought to agree in the requisite corrections. In case the doubt relates only to which of two districts, both lying entirely within the jurisdiction of the commissioners, certain pupils should be assigned, there is no difficulty in arriving at the whole number which is to constitute the divisor of the money apportioned to the county according to population. All there is to do is to exclude them from being counted more than once in making up the sum total. Divide the money apportioned according to population for teachers' wages by the whole number of children, and the quotient will be the sum to which each district is entitled for each pupil resident within its bounds. This sum, multiplied by the *admitted* number of pupils in each separate neighborhood, district and part, will give the teachers' money to which such neighborhood, district or part is entitled without dispute. There will then remain unapportioned a sum equal to the number of children whose residence is in dispute, multiplied by the common multiple, which indicates the money to which a district is entitled for each pupil. This sum should be stated in the commissioner's certificate as "reserved for apportionment by a supplemental certificate;" and after stating in the certificate the sum to which each district is entitled, without dispute, the additional amount to which it *may* be entitled should be stated as "contingent upon supplemental apportionment." The object is, that the apportionment should be perfected as far as possi-

ble without waiting for the final determination in regard to the small sums in dispute upon appeal to the State Superintendent or otherwise. The same method is applicable to the apportionment of library money which is affected in the same way by any doubt as to the district in which pupils ought legally to be enumerated.

A case may arise in which the question is, not whether certain children should be enumerated as residents of one district within the county or of another, but whether they should be enumerated in the county at all. For example, the trustees of a district may have enumerated the pupils at a boarding school who are the children of residents in other counties of this state, and may not have corrected their report at the time the commissioners are called upon to make the apportionment. To include such children will have the effect to reduce in a slight degree the apportionment of every other district in the county. To exclude them, however, would enhance the teachers' money of every other district, ordinarily by an amount so trifling as to be of no consequence to those districts, while it would deprive the district claiming to enumerate them of an amount which might be of serious importance to it. It is advisable, therefore, in cases where any serious argument can be made in support of the enumeration of such disputed residents, to count them in the aggregate of pupils in the county, but to exclude them in apportioning the money to the district in which they are claimed; stating at the same time in the certificate the amount, to which a decision in favor of the right of the district to enumerate them would entitle it, as "contingent upon supplemental apportionment." If its claim is sustained by the department, the supplemental certificate should be filed; if, on the contrary, the claim is rejected, the sum thus reserved may be apportioned in a supplemental certificate, or, if the amount is very small, may remain in the county treasury and be apportioned with that received the next year.

The course herein recommended accords with that sanctioned by Superintendent Dix, in 1834 (Common School Decisions, page 181), and enjoined by his successors at various times since.

After the amount to which a district is entitled is thus ascertained, a portion thereof is, in certain cases, to be deducted for the support of schools for colored children. For instructions upon this point, see the remarks under a subsequent section relating to that subject.

A deduction is also to be made for the public moneys apportioned to any district on account of Indian children who may be enumerated as residents therein, and the amount apportioned on their account to be

separately stated in the certificate, so that the same may be devoted exclusively to their education in separate Indian schools, if they elect to attend such under the regulations for that purpose to be made by the State Superintendent.

The fourth clause of No. 32 restricts the apportionment to those neighborhoods, districts and parts as to which it appears, from the report of the trustees thereof for the last preceding school year, that a public school was supported by the inhabitants and taught by a duly qualified teacher for at least six months during the year ending with the date of such report, except by special permission of the State Superintendent.

Section 2, of chap. 237 of 1838, amended the Revised Statutes by requiring school to be kept *four* months, instead of three, to entitle the district to an apportionment, "which four months," it declared in express terms, "shall be kept by a qualified teacher or teachers *after obtaining a certificate of competency* from the school inspectors." This was a legislative exposition of the principle, sufficiently manifest without it, that a certificate cannot be regarded as having a retroactive operation, and this construction has been enforced by the department in applying the statute of 1851, which extended the necessary period of instruction from four months to six.

Section 24, title 2, chap. 15, part 1 of the Revised Statutes superadded, as a condition to be fulfilled before a district can be entitled to an apportionment, that it shall appear from the report for the last preceding school year "that all moneys received from the commissioners during that year have been applied to the compensation of such teacher," i. e., a teacher possessing a proper certificate of qualification. Sec. 11, chap. 480 of 1847, reënacted this provision, and added to it the further condition that it shall appear from such report "that no other than a duly qualified teacher had, at any time during the year, for more than one month been employed to teach the school in said district." Neither of these provisions have been repealed; and a failure to comply with either of them will render necessary an application to the Superintendent of Public Instruction for an order granting special permission to the commissioners to include the delinquent district in the apportionment.

As every order of the department is in its nature a judicial act, and must be based upon legal evidence, an affidavit, duly verified by the trustees or some of them, must be forwarded, stating, 1st. The delinquency which excludes the district from the right to an apportionment. If it consist in the fact that a school has not been maintained

for six months by a qualified teacher, the affidavit should set forth precisely how long it was taught by a qualified teacher, and for how long a period, if any, by a teacher not possessing a proper certificate. If it consist in the fact that the money apportioned in the preceding year was not wholly expended, it should state *how much* was expended, or how much remained unexpended. All money is to be regarded as expended for which the trustees have given a valid order to a qualified teacher, although such order may be outstanding on the 1st of January, in the hands of such teacher or of his assignee, not having been presented to the supervisor for payment. 2d. The affidavit must state with precision the facts and circumstances which occasioned the delinquency and are supposed to excuse it. The statute confers the power upon the superintendent to "direct an apportionment according to the equitable circumstances" where an apportionment shall not have been made to any school district in consequence of any *accidental* omission to make any report required by law or to comply with any other provision of law or any regulation. It is not the object of the statute to relieve the district, when the money is lost by a willful violation of duty or the sheer neglect of the trustees. In such cases the law gives the district an ample remedy against them, personally; and it is against public policy that any encouragement should be given to such neglect, by relieving them from its penalty. Such circumstances as the destruction of a school-house by fire, and the inability after suitable effort to procure rooms for temporary use as a school-house; the casual sickness of a teacher, so late in the year that after reasonable effort another qualified person could not be found to complete the six months' instruction before the 31st of December; such and similar cases of unavoidable accident and hardship, are those which the law intends as the subject of relief. The *facts* must be stated, and not simply the conclusions of the trustees in respect to them, for it is the duty of the superintendent to judge of the validity of those conclusions. For example, the trustees may state in all honesty that they were unable to procure a teacher, where if the facts were fairly set forth it would be seen that the only reason of such failure was that they offered an entirely inadequate compensation.

The fifth clause of No. 32 requires the commissioners, after ascertaining the amount apportioned *by them* to each separate neighborhood, district and part district, to collect and arrange those amounts, so as to show what and how many of them are to be set apart to each town within their jurisdiction. Each district lying wholly within their jurisdiction is to be regarded, for this purpose, as if it were situated entirely

within the town which contains its school-house. In the case of a district which possesses two or more school-houses, the whole district is to be regarded as being in that town in which its principal or earliest built school-house is situated. To each town is also to be set apart the apportionment for any part of a joint district lying therein, the other part of which joint district is situated in a city or in an adjoining county. It is only in this case that part districts are recognized in the apportionment.

The sixth clause of No. 32 directs the commissioners to make a certificate, which is to show the amount apportioned to each separate neighborhood, district and part of a joint district (in the case above mentioned) by them, and also the amount apportioned by the State Superintendent to each separate neighborhood and to each district having its school-house in the county. These should be separately stated. The following form may be adopted for the certificate:

The undersigned, school commissioners for the county of
do hereby certify that the sums of money set opposite to the several separate neighborhoods, school districts and parts of districts, within their jurisdiction in said county, have been apportioned to them respectively by the State Superintendent of Public Instruction as district quotas, to be applied to the payment of teachers, and by the undersigned commissioners for the payment of teachers' wages and for library purposes, according to the headings of the columns in which said sums are respectively set down, viz:

Town of ——,	For Teachers' Wages.		For Libraries.	Total.
	District quota.	Pupil quota.		
Separate neighborhood, ...	$4 62	$9 80	$0 00	$14 42
Dist. No. 1, ...	30 10	35 70	2 80.5	68 60.5
Dist. No. 2, ... (Indians.)	60 20	106 40	8 36	174 96
Part of Joint District No. 3, ...	0 00.	15 40	1 22	16 62
Do. *contingent*, on supplemental apportionment, ...	0 00	2 10	0 16.5	2 26.5
Aggregate (omitting contingent), ...	$94 92	$167 30	12 38.5	$274 60.5

The table is to be continued in the same manner for each town in the county.

In the above specimen table, District No. 2 is supposed to have maintained two teachers for six months, while District No. 1 maintained but one, and Joint District No. 3 to have been entitled to no district quota,

or to have its school-house in an adjoining county or city. In the latter case, its district quota will appear in the certificate of the commissioners of such adjoining county or city.

The separate neighborhood is supposed to have fourteen residents, between four and twenty-one years of age; No. 1, 51; No. 2, 152; and the part of Joint District No. 3 to have twenty-two admitted residents, and to claim three in addition, whose residence is disputed, and the apportionment on account of them is therefore set down as contingent.

The seventh clause of No. 32 directs the commissioners to send one copy of their certificate to the county treasurer and another to the state superintendent.

The most convenient form in which to furnish the certificate therein required, to be sent to the supervisor of each town, will be to make a transcript of so much of the table of apportionment as relates to the town, and annex thereto a certificate substantially as follows:

To the supervisor of the town of

"The undersigned, school commissioners for the county of hereby certify that the foregoing table is a transcript of so much of the apportionment of school moneys for the year 1857 as relates to the town of , in said county, and that the several sums set opposite to each separate neighborhood, district and part of a district, are the sums which are to be paid upon the orders of the trustees of such neighborhoods and districts respectively for teachers' wages, and to such trustees for library purposes, according to the headings of the columns in which such sums are respectively contained, and that the total amount of school moneys so apportioned, which you are now entitled to receive from the county treasurer, is $." State the aggregate, *excluding* all sums contingent upon supplemental apportionment.

When the right to any moneys contingently apportioned has been finally determined, the commissioners should transmit to the supervisor of the town a certificate stating that fact, and that he is entitled to receive from the county treasurer the further sums of for teachers' wages, and for library purposes, stating the districts to which they have been adjudged to belong. They should also transmit to the county treasurer a supplemental certificate of apportionment, in the form above given, except that it should state that "the sums of money heretofore contingently apportioned have been finally apportioned to the respective districts, &c., opposite to which they are set, to

be applied to teachers' wages and to library purposes, according to the heading of the columns," &c.

No. 33. When the census or returns, upon which an apportionment is to be made, shall be so far defective in respect to any county, city or town as to render it impracticable for the superintendent to ascertain the share of school moneys which ought then to be apportioned to such county, city or town, he shall ascertain, by the best evidence in his power, the facts upon which the ratio of such apportionment shall depend, and shall make the apportionment accordingly. (*Sec.* 6, *title* 2, *chap.* 15, *part* 1, *Revised Statutes.*)

This section is followed in the Revised Statutes by another, which appears to be rendered inoperative by the statute of 1856, superseding the apportionment among towns by the State Superintendent. As, however, it has never been expressly repealed, and the anomalous condition of one county (Schuyler) suggests a case in which an apportionment between the towns of a county may still be necessary, the section, 7, is here inserted. For similar reasons, and for the further one that so much of it as directs the apportionment made by the superintendent to be certified to the comptroller, has not been replaced by any subsequent statute, section No. 8 of the same title of the Revised Statutes is also here inserted.

§ 7. Whenever, in consequence of the division of a town, or the erection of a new town in any county, the apportionment then in force shall become unjust, as between two or more of the towns of such county, the superintendent shall make a new apportionment of the school moneys next to be distributed amongst such towns, ascertaining by the best evidence in his power the facts upon which the ratio of apportionment, as to such towns, shall depend.

§ 8. The superintendent shall certify each apportionment made by him to the comptroller, and shall give immediate notice thereof to the clerk of each county interested therein and to the clerk of the city and county of New-York; stating the amount of moneys apportioned to his county and to each town and city therein, and the time when the same will be payable to the treasurer of such county or to the chamberlain of the city of New-York.

No. 34. It shall be the duty of the clerk of the board of supervisors in each county of this state, on the last day of December in each year, to transmit to the Superintendent of

common schools [Public Instruction] certified copies of all resolutions and proceedings of the board of supervisors, of which he is clerk, passed or had during the preceding year, relating to the raising of any money for school or library purposes and to report particularly the amount of such moneys directed to be raised each town of said county; and in case it shall not appear that the amount required by law to be raised for school and library purposes has been directed to be raised during the year by the board of supervisors of any county, the Superintendent of common schools [Public Instruction] and the comptroller may direct that the money appropriated by the state, and apportioned to such county, be withheld until the amount that may be deficient shall be raised, or that so much only of the money apportioned to such county be paid to the treasurer thereof as shall be equal to the amount directed to be raised therein by the supervisors of such county; and in such case the balance so withheld shall be added to the principal of the common school fund. (*Sec.* 3, *chap.* 330 *of* 1839.)

It will be seen by No. 41, *post*, that an additional remedy is provided for the case where, though the board of supervisors have directed the raising of the school tax upon their county, the actual collection and payment thereof into the state treasury is delayed beyond the proper time.

OF THE PAYMENT OF SCHOOL MONEYS INTO THE STATE TREASURY, AND OF THEIR DISTRIBUTION.

No. 35. Dues to the state, which have heretofore been paid to the secretary of state in the capacity of superintendent of common schools, shall hereafter be paid into the state treasury; and all balances, now standing to the credit of the superintendent of common schools or the Superintendent of Public Instruction, shall be immediately transferred to the credit of the treasurer of the state. (*Sec.* 1, *chap.* 228 *of* 1854.)

No. 36. The treasurer shall transfer from one depository to another, by a draft to be countersigned and entered by the Superintendent of Public Instruction, any school moneys standing to his credit; and no such moneys shall be transferred from one depository to another except by such draft (*Sec.* 2, *chap.* 228 *of* 1854.)

No. 37. All moneys, now authorized by law to be paid or advanced by the superintendent of common schools or the Superintendent of Public Instruction, and all moneys which shall hereafter be authorized to be paid or advanced out of the school moneys, shall be paid by the treasurer upon the warrant of the Superintendent of Public Instruction; but no warrant shall be drawn, unless authorized by law, and shall refer to the law under which it is drawn. (*Sec.* 3, *chap.* 228 *of* 1854.)

This provision is "limited in its application to school moneys raised by taxation" by the third section of chap. 18 of 1855, No. 39, *post.* So much of the school moneys as are derived from the revenues of the school fund and of the United States deposit fund are distributed upon the warrant of the comptroller, according to a certificate made to him by the superintendent of the share of such moneys to which each county and city is entitled.

No. 38. The said superintendent shall countersign and enter all checks drawn by the treasurer in payment of his warrants, and all receipts for school moneys paid to the treasurer, and no such receipt shall be evidence of payment unless so countersigned. (*Sec.* 4, *chap.* 228 *of* 1854.)

Limited, as mentioned in note to No. 37.

No. 39. The act entitled "An act in relation to school moneys," passed April 15, 1854, shall be limited in its application to school moneys raised by taxation. (*Sec.* 3, *chap.* 18 *of* 1855.)

The act herein mentioned consists of the four preceding sections. Nos. 35, 36, 37 38.

No. 40. The sum annually to be distributed for the encouragement of common schools shall be paid on the 1st day of February in every year, on the warrant of the comptroller, to the treasurers of the several counties and the chamberlain of the city of New-York. (*Sec.* 12, *title* 2, *chap.* 15, *part* 1 *of Revised Statutes.*)

The article in which the preceding section is contained is entitled, "*Of the Distribution of the Common School Fund;*" and the sum annually to be distributed, at the time that article took effect, was the

appropriation from the revenue of the common school fund, as stated in the note to No. 25. By chap. 237 of 1838, the sums of $110,000 for teachers' wages, and $55,000 for district libraries, were appropriated from the income of the United States deposit fund, and directed to be distributed "in like manner and upon the like conditions as the school moneys are now or shall be hereafter distributed." The sum required to be distributed on the first day of February, on the warrant of the comptroller, does not include the proceeds of the state tax for the support of schools which are paid on the warrant of the superintendent. See No. 37 and note thereto.

No. 41. The comptroller is hereby authorized to withhold the payment of any moneys, to which any county may be entitled from the appropriation of the incomes of the school fund and the United States deposit fund for the support of schools, until satisfactory evidence shall be furnished to him that all moneys required by law to be raised by taxation upon such county, for the support of schools throughout the state, have been collected and paid, or accounted for to the state treasurer; and whenever, in consequence of the failure of any county to pay such moneys, there shall be a deficiency of moneys in the treasury applicable to the payment of school moneys to which any other county may be entitled, the treasurer and Superintendent of Public Instruction are hereby authorized to make a temporary loan of the amount so deficient; and such loan, and the interest thereon until payment shall be made to the treasury, shall be a charge upon the county or counties in default, in proportion to the amount and duration of its or their defalcation respectively, and shall be added to the amount of state tax, and levied upon such county or counties by the board of supervisors thereof, at the next ensuing assessment, and shall be paid into the treasury in the same manner as other taxes. (*Sec.* 2, *chap.* 18 *of* 1855.)

The object of the legislature in the preceding provision was to prevent the moneys raised for school purposes in the several counties from being withheld from the state treasury, and being temporarily employed to supply the deficiencies in the county treasuries arising from delay in the collection of taxes imposed for county purposes. It is therefore required that the county's proportion of the school tax should have been actually *collected*, and either paid into the state treasury or accounted for—as it might be by receipts from the supervisors of their respective

towns, showing the payment to them, on account of the apportionment to their towns made by the State Superintendent and the school commissioners, of an amount equal in the aggregate to the school tax due from the county—before the county treasurer is authorized to require from the comptroller a warrant for the amount apportioned to his county from the incomes of the school fund and United States deposit fund.

It also subjects the county to the payment of interest upon so much of its school tax as is withheld from the state treasury, whenever it becomes necessary to make a loan to furnish the state treasury with the funds for the payment of school moneys to any other county which is not in default, and is therefore entitled to immediate payment,

It is obviously, therefore, the duty of the county treasurer, for the purpose of protecting his county from the liability to the payment of interest on a loan to be made on its account, to regard the first moneys which come to his hands from the town collectors as belonging exclusively to the school fund. Other claims may be postponed without incurring a charge for interest, while this cannot. The power and duty of the treasurer and State Superintendent to make loans under this section is not suspended, when, as is often the case, the legislature extends the time for the collection of taxes; and it would be most unjust that the schools should suffer in those counties which have collected their taxes promptly, for want of the exercise of that power, at the expense of the counties where their collection is delayed, either by an extension of the time for collection or by the return of non-resident lands. In the latter case, the county treasurer can obtain the money or a credit thereof from the comptroller, for all the arrears of taxes admitted by him, and should not therefore subject the school tax to any deduction or reservation on account of returned lands.

No. 42. The treasurer of each county, and the chamberlain of the city of New-York, shall apply for and receive the school moneys apportioned to their respective counties, as soon as the same become payable. (*Sec.* 13, *title* 2, *chap.* 15, *part* 1, *Revised Statutes.*)

No. 43. Each treasurer receiving such moneys shall give notice in writing to some one or more of the commissioners of common schools [supervisor] of each town or city in his county, of the amount apportioned to such town or city, and shall hold the same, subject to the order of such [supervisor]

commissioners. (*Sec.* 14, *title* 2, *chap.* 15, *part* 1, *Revised Statutes.*)

No. 32, *ante*, provides for a notice, from the school commissioners to the supervisor of each town, of the *amount* apportioned thereto. The only object of a notice from the treasurer is that the supervisor should be informed that the money is actually in the treasury, subject to his order. While the supervisor should not wait for such notice, the obligation to give which is now rather matter of argument than of express injunction, there is an obvious propriety in the treasurer giving it at the earliest possible day.

No. 44. The public school moneys heretofore paid to town superintendents, or on their orders, shall be paid only to the supervisors of the towns. (*Sec.* 19, *chap.* 179 *of* 1856.)

Treasurers of counties have no right to deduct from the amount of the school moneys apportioned to each town a commission of one per cent. They are unquestionably *entitled* to such a commission, under sec. 26, 1 R. S., 370, on the moneys received and paid by them for the use of the common schools; but they have no right to diminish the amount of the moneys placed in their hands for distribution, under an apportionment, by the superintendent. Their commission is a charge upon the county, and not upon the common school fund. (*Com. School, D.c's*, 279.)

No. 45. Before the county treasurer of any county shall pay over to the supervisor of any town in said county the public school moneys apportioned for the support of schools therein, he shall require the said supervisor to deposit with him a bond to the treasurer, in behalf of the town, executed by said supervisor, with two or more sufficient sureties, to be approved by said treasurer, in the penalty of double the amount of said school moneys, conditioned for the faithful disbursement, safe keeping and accounting for such moneys, and of all other school moneys that may come into his hands from any other source; and whenever the said bond shall be forfeited, it shall be the duty of the county treasurer to prosecute for the penalty of the same, in his own name, in behalf of the town, and the money recovered shall be paid over to the supervisor of the town succeeding the supervisor in default. (*Sec.* 20, *chap.* 179 *of* 1856.)

The bond to be given under this section must be renewed every year, as its penalty in each case is to be double the amount of the school moneys then to be paid. Its form may be as follows:

Know all men by these presents, that we, John Doe, supervisor of the town of ———, in the county of ———, and Richard Roe and Samuel Styles, of the same town (or as their residence respectively may be), as his sureties, are held and firmly bound unto Stephen Holdfast, treasurer of the county of ———, in the penalty of ——— dollars and —— cents (being double the amount of the public moneys apportioned for the support of schools in the town of ———, aforesaid), to be paid to the said Stephen Holdfast, treasurer, his successors in office, attorney or assigns; to which payment, well and truly to be made, we bind ourselves jointly and severally by these presents, sealed with our seals and dated this —— day of ———, in the year of our Lord ———.

The condition of this obligation is such, that if the above bounden John Doe, supervisor, shall faithfully disburse, safely keep and justly account for the school moneys apportioned as aforesaid, and all other school moneys that may come into his hands from any other source, then this obligation to be void, otherwise to remain in full force and virtue.

JOHN DOE. [L. S.]
RICHARD ROE. [L. S.]
SAMUEL STYLES. [L. S.]

This bond as a matter of prudence should be acknowledged before a commissioner of deeds or other officer authorized to take acknowledgments, and the sureties should be required to indorse upon the bond an affidavit that each of them is a freeholder, and worth the amount of the penalty over and above all debts incurred or liabilities assumed by him. It is only upon such an affidavit that bonds required in legal proceedings are approved; and it is a matter of justice to the county treasurer that he should protect himself from personal liability for taking an insufficient bond by following the legal method of ascertaining its sufficiency. If, after such affidavits are indorsed on the bond, the county treasurer is satisfied with the sureties, he should indorse his approval in the following form:

I hereby approve the within bond, as to its form and manner of execution and the sufficiency of the sureties therein. Dated ———.

STEPHEN HOLDFAST,
Treasurer of ——— County.

No. 46. In case the commissioners [supervisor] of any such city or town shall not apply for and receive such moneys, or in case there are no commissioners appointed in the same before the next receipt of moneys apportioned to the county, the moneys so remaining with the treasurer shall be retained by him, and be added to the moneys next received by him for distribution from the Superintendent of common schools [Public Instruction], and be distributed therewith and in the same proportion. (*Sec.* 15, *tit.* 2, *chap.* 15, *part* 1 *of Revised Statutes.*)

The commissioners referred to in this section are not the school commissioners of the county, but "commissioners of common schools," a board of *town* officers, whose office was abolished by chap. 133 of 1843, and their duties devolved upon the "town superintendent of common schools." All the duties of town superintendents in relation to the receipt and disbursement of school moneys being, by chap. 179 of 1856, devolved upon the supervisors, the latter officer stands in the place of the former town commissioners of common schools for all the purposes of the preceding section.

The case provided for by this section is now of very improbable occurrence, and the mode of disposing of the money remaining with the treasurer is inconsistent with the requisitions of subsequent statutes. So far as the money apportioned to the town for "district quotas" is concerned, it is not a thing of proportion, as between the towns of the county; and the right of a district thereto, having vested for any one year, is not to be affected by a different distribution made in the succeeding year. The same is true in relation to the money apportioned for pupil quotas and for libraries. The possession by the county treasurer must be regarded, so far as the rights of the districts are concerned, precisely as its possession by the supervisor would have been, had the latter received it, as he ought to have done. Further legislation may be necessary to provide a proper remedy for the districts, in the default of a supervisor to receive and hold the money as their trustee; but so much of the section as might seem to authorize a distribution of it by the treasurer to the several towns of his county must, from its inconsistency with the existing law, be deemed to be repealed.

No. 47. The amount of money necessary to pay the salaries of the school commissioners, and which shall be annually apportioned by the State Superintendent of Public Instruction

from the United States deposit fund for that purpose, as hereinbefore provided, shall be drawn from the income of that fund, upon the warrant of the comptroller, and retained in the treasury to be paid out by the treasurer to the several school commissioners, upon the order of the said State Superintendent. (*Sec.* 32, *chap.* 179 *of* 1856.)

OF THE CUSTODY AND DISBURSEMENT OF SCHOOL MONEYS BY THE SUPERVISORS OF TOWNS.

No. 48. Whenever the board of supervisors of any county in this state shall have appointed a commissioner or commissioners, in pursuance of this act, and such officers shall have taken the constitutional oath of office, henceforth, and after that time, the office of town superintendent of common schools for the several towns in such county shall be abolished, and each town superintendent shall forthwith pay over to the supervisor of his town all school moneys unexpended, with a full statement of all moneys received and paid out by him since the last annual report made by him or his predecessor, and of the moneys remaining in his or his predecessor's hands at the time of making such report. He shall also specify in such statement the last apportionment made to the school districts, separate neighborhoods and parts of joint districts in his town, and shall also state specifically the part of such apportionment paid to each, and the balance thereof due to each. If it shall appear that any former town superintendent has neglected or refused to render to his successor in office such full statement of all moneys received and paid out by him during his official term or terms, it shall be the duty of the commissioners created under this act, or any one of them, to require such delinquent town superintendent, by notice in writing, to make such return to the supervisor of his town within twenty days from the date of such service; and if, after having been duly served with such notice, he still neglects or refuses to make such return as aforesaid, or show good cause why he has not done so, he shall be guilty of a misdemeanor, and it shall be the duty of the supervisor of the town, or of any commissioner created by this act, to sue for and recover all moneys in the hands of any defaulting town superintendent. (*Sec.* 17, *chap.* 179 *of* 1856.)

No. 49. Every supervisor who shall embezzle any of such moneys, or any moneys that shall come into his hands by virtue of this act, shall be deemed guilty of a misdemeanor. (*Sec.* 18, *chap.* 179 *of* 1856.)

No. 50. The said supervisors, in the disbursement of and accounting for school moneys which shall come into their hands, shall be governed by the same laws and rules as are now applicable to town superintendents. Each of the said supervisors shall keep a just and true account of all the school moneys received and disbursed by him during each year, and shall lay the same, with proper vouchers, before the board of town auditors, at each annual meeting of such board. (*Sec.* 21, *chap.* 179 *of* 1856.)

The law which governed town superintendents, and now governs the supervisors in the disbursement of so much of the school moneys as is apportioned for the payment of teachers' wages, requires them to pay it upon the written orders drawn upon them by a majority of the trustees of each district in favor of qualified teachers. If the order is regular upon its face — that is to say, if it bears the signature of a majority of the persons acting in fact as trustees of a district, under color of an election, in favor of a person whom it states to be a duly qualified teacher employed by them in the district during the year in which it is drawn and in payment of his wages as such teacher — it is a sufficient voucher for the supervisor, and it is not for him to inquire whether the trustees have exceeded their authority or acted improperly in drawing the order. If presented by any other person than the teacher in whose favor it is drawn, it should bear his written indorsement, or order for payment to a specified person.

Library money may be paid to any person upon the written order of a majority of the trustees, or to either of the trustees upon the written receipt of a majority of them.

The account to be kept under this section may be a simple cash account, in which the supervisor, *personally* and in his individual name, is charged with all school moneys received by him and credited with each payment, specifying the date, the person to whom and the account on which it was made. It would conduce to accuracy and convenience, in passing his accounts before the board of town auditors, to number each credit consecutively, and to affix the same number to the order, receipt or other voucher to be produced in proof of payment and in

support of such credit. This account should be kept in a bound book, to be handed over to his successor in office, and a transcript of such account be drawn off, and, with the accompanying vouchers, be presented to the board of town auditors for their examination. As that examination may take place before the close of his official term, it would be well, upon its completion, to have the town auditors enter upon the *original* account, in the blank book, their certificate that they have examined such account up to and including the last preceding entry (giving its date) and the vouchers therefor and have audited and allowed the same.

In addition to the cash account of the individual supervisor, a continuous account is to be kept between each district and the supervisor, officially, without break or change when a new incumbent succeeds to the office, as will be explained under No. 51.

The board of town auditors is required by law to meet annually in each town, at the place of holding the last town meeting, on the last Thursday preceding the annual meeting of the board of supervisors of the county. (*Chap.* 228 *of* 1844.) It consists, for the purpose of examining the supervisor's account, of the town clerk and justices of the peace, or any two of the justices of the peace. The supervisor, who is ordinarily a member, cannot, of course, act in his own case. The account to be presented to them, is to be accompanied by an affidavit, attached to and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct, and that the disbursements charged therein have been in fact made. (*Sec.* 2, *chap.* 490 *of* 1847.)

No. 51. The said supervisor shall, within fifteen days after the termination of his office, render to his successor in office a just and true account, in writing, of all school moneys by him received before the time of rendering such account, and of the manner in which the same or any part thereof shall have been expended by him; and the account so rendered shall be delivered by such successor in office to the town clerk, to be filed and recorded in his office; and the town clerk shall forthwith send a copy of such account to the school commissioner. Each supervisor shall keep a bound blank book, in which all his receipts and disbursements of school moneys shall be entered by him, specifying from whom, and the purpose for which they were received; and to whom, and the purpose for which they were paid out.

The cost of such book shall be a charge upon his town; and said book shall be delivered to his successor in office. (*Sec.* 22, *chap.* 179 *of* 1856.)

The account to be rendered by the supervisor to his successor in office, includes as well that portion thereof which has been examined by the town auditors as that which relates to his subsequent receipts and disbursements. Inasmuch as it is to be filed and recorded in the office of the town clerk, it must, independent of and in addition to the original cash account, be entered upon the blank book.

The object of an account book to be kept by the supervisor and to pass to his successors in office, is to enable the latter to ascertain at any future time the state of the accounts of each district with any of their predecessors at any given date. To effect this object it is essential that a separate account should be kept with the trustees of each district and separate neighborhood, regarding them as a perpetual corporation. It is in substance an account between the district and the town, which is not broken or affected by any change in the officers of either. It may be in the following form:

Trustees of District No. 2, with the Supervisor of town of ———.

Dr.			Cr.		
1856.			1856.		
July 27th. To paid Miss Anna Davis, teacher's wages, on order of *J. D.* and *C. S.*, trustees (voucher No. 12), ...	$42	60	June 7th. By cash received from late town superintendent for teachers' wages, ...	$63	80
Sept. 3d. Paid Noah Parsons on teacher's wages, on order of *J. D.* and *L. M.*, trustees (voucher No. 33), ...	21	20	Do. for library, ...	4	18
Sept. 25th. Paid *L. M.* and *P. S.*, trustees, library money (voucher No. 46),	4	18	1857.		
Oct. 22d. To copy Code of Public Instruction, ...	1	50	April 2d. Cash of county treasurer for teachers' wages, ...	166	60
			Do. for library, ...	8	36
			May 12th. Cash of county treasurer on supplemental apportionment for teachers' wages, ...	2	10
			Do. for library, ...		16

No. 52. On rendering such account, if any balance shall be found remaining in the hands of such supervisor, the same shall be immediately paid by him to his successor in office, who shall hold it subject to the order of the trustees of any school districts, parts of district, or to the trustee of any separate neighborhood, to which the same may have been apportioned, and which shall be entitled to receive it. (*Sec.* 23, *chap.* 179 *of* 1856.)

The orders and other vouchers of the account of the supervisor going out of office belong to him only in his official character, and should be delivered to his successor, precisely as if he was vacating an official place of business in which such vouchers were by law required to be filed and kept. On turning them over to his successor, the latter should give to his predecessor a receipt which may be substantially in the following form:

Received of John Doe, late supervisor of the town of ———, dollars and —— cents for balance of school moneys remaining in his hands.

Also, vouchers from No. —— to No. ——, both inclusive, in support of his charges for disbursements, bearing the same numbers in his cash account, and amounting in the aggregate to the sum of ——— dollars and ——— cents.

Also, one (or two or more, as the case may be) bound account book, and one copy Hull's Treatise on Town Officers (or whatever other books, papers or other property are in his custody as supervisor). Dated

R. Roe, Supervisor of ———.

The account book should contain an inventory of all books or other property which may from time to time come into the custody of the supervisor in the discharge of his duties as a school officer.

No. 53. It shall be the duty of the supervisor, by his name of office, to sue for and recover all penalties and forfeitures imposed by any act relating to schools in respect to which no provision is made, or for any default or omission by any town superintendent, or any other town officer or school district officer or officers, now required to be sued for by the town superintendent; and, after deducting his costs and expenses, shall report the balance in his hands to the commissioner, who shall apportion the same to the district or districts to which the same may belong. (*Sec.* 24, *chap.* 179 *of* 1856.)

The commissioner to whom the sums collected for penalties and forfeitures are to be reported, is the school commissioner of the assembly district or section of a county in which the supervisor's town is situated. It will be requisite to state in the report under what section of the law and against what school officer the several penalties were recovered, to enable the commissioner to determine whether they belong to any and what district, or are to be apportioned to several districts.

No. 54. All the powers and duties formerly possessed and exercised by the trustees of the gospel and school lots, and subsequently, by section one of chapter one hundred and eighty-six, Laws of one thousand eight hundred and forty six, conferred upon town superintendents of common schools, are hereby conferred and imposed upon the supervisors of towns, and shall hereafter be exercised and performed by them. (*Sec.* 27, *chap.* 179 *of* 1856.)

In accordance with the above sections, whenever the words "town superintendents" occur in the following extracts from the statutes, they have been changed to "supervisors."

Town School Funds.

The act passed in 1789 for the sale of lands belonging to the people of this state required the surveyor-general to reserve, in each township, one lot for the support of the gospel, and one lot for the use of schools in such township.

The following is a list of the principal reservations of this nature, viz:

One lot, of 550 acres, in each of the twenty-eight townships in the military tract.

Forty lots, of 250 acres each, in each of the twenty townships west of the Unadilla river, being ten thousand acres.

One lot, of 640 acres, in each of the townships of Fayette, Clinton, Greene, Warren, Chenango, Sidney and Hampden, then in the counties of Broome and Chenango.

Ten lots, of 640 acres each, in the townships along the St. Lawrence.

In the township of Plattsburgh 400 acres were reserved for the use of a minister of the gospel, and 460 acres for the use of a public school or schools in the said township.

In the township of Benson 640 acres were reserved for gospel and schools.

By an act passed in 1798, in relation to gospel and school lots, it is provided "that the moneys arising from the leasing of the said lots of land as aforesaid, and from the trespasses aforesaid, shall be applied to the use of schools or support of the gospel in the original townships, as surveyed, in which such lots shall be respectively situated, and for no other purpose; which said application shall be made either for schools or gospel, or both, and in such way and manner as the freeholders and inhabitants of the towns, in which the same lands shall lie, shall in legal town meeting from time to time direct, order and appoint."

By an act passed in 1808, the act of 1798 was extended to all the townships where lots of land are reserved for the support of gospel and schools, and the following provision was added:

"§ 1. *Be it enacted, &c.*, That the moneys arising from the annual rents and profits of the gospel lots in each township shall be equally divided, by the supervisor and commissioners appointed in each township, between the several religious societies legally organized in such township, and that the money arising from the annual rents and profits of the several school lots shall be distributed among the schools kept in each respective township, by teachers to be approved of by the supervisor and commissioners constituted by the act to which this is an amendment, or a majority of them in said township, in proportion to the aggregate number of days which the scholars in each respective school shall have respectively attended such schools in the year immediately preceding such division."

The fourth section of an act concerning the gospel and school lots, passed in 1813, is as follows:

"*And be it further enacted*, That the rents, issues and profits of the aforesaid lands, and the annual interest of the moneys arising from the sale thereof, shall be applied by the said trustees [supervisor] for the time being to the support of the gospel and schools in their several towns, in such manner as the freeholders and inhabitants of the towns, respectively, at their annual town meeting, shall order and direct, or as the legislature shall prescribe by law." (*Session Laws of* 1813, *p.* 157.)

In 1819, an act was passed in relation to the gospel and school lots, which contains the following section:

"§ 2. *And be it further enacted*, That all moneys now due or hereafter to become due, and which shall have come into the hands of the aforesaid commissioners of public lots, and have not been applied and paid over to religious societies, shall be apportioned among the several school districts in the several towns of the aforementioned counties [Onondaga, Cayuga and Seneca], anything in the acts heretofore passed to the contrary notwithstanding."

By § 1 of chap. 186, Laws of 1846, "the office of trustees of the gospel and school lots in the several towns in this state is hereby abolished; and the powers and duties now by law conferred and imposed upon said trustees shall hereafter be exercised by the town superintendent of common schools [supervisor]."

By the provisions of chap. 15, title 4, of part 1 of the Revised Statutes, the trustees of the several gospel and school lots [supervisor] were authorized and required:

"1. To take and hold possession of the gospel and school lot of their town.

"2. To lease the same for such time, not exceeding twenty-one years, and upon such conditions as they shall deem expedient.

"3. To sell the same, with the advice and consent of the inhabitants of the town, in town meeting assembled, for such prices and upon such terms of credit as shall appear to them most advantageous.

"4. To invest the proceeds of such sales in loans secured by bond and mortgage upon unincumbered real property of the value of double the amount loaned.

"5. To purchase property so mortgaged upon a foreclosure, and to hold and convey the property so purchased, whenever it shall become necessary.

"6. To release the amount of such loans repaid to them upon the like security.

"7. To apply the rents and profits of such lots, and the interest of the money arising from the sale thereof, to the support of the gospel and schools, or either, as may be provided by law, in such manner as shall be thus provided.

"8. To render a just and true account of the proceeds of the sales, and the interest on the loans thereof, and of the rents and profits of such gospel and school lots, and of the expenditure and appropriation thereof, on the last Tuesday next preceding the annual town meeting in each year, to the board of auditors of the accounts of other town officers.

"9. To deliver over to their successors in office all books, papers and securities relating to the same, at the expiration of their respective offices: and

"10. To take therefor a receipt, which shall be filed in the clerk's office of the town.

"§ 4. The board of auditors in each town shall annually report the state of the accounts of the trustees of the gospel and school lots [supervisor] in that town to the inhabitants thereof, at their annual town meeting.

"§ 5. Whenever a town, having lands assigned to it for the support of the gospel or of schools, shall be divided into two or more towns, or shall be altered in its limits by the annexing of a part of its territory to another town or towns, such lands shall be sold by the trustees [supervisor] of the town in which such lands were included immediately before such division or alteration; and the proceeds thereof shall be apportioned between the towns interested therein, in the same manner as the other public moneys of towns so divided or altered are apportioned.

"§ 6. The shares of such moneys to which the towns shall be respectively entitled shall be paid to the trustees of the gospel and school lots [supervisor] of the respective towns, and shall thereafter be subject to the provisions of this title.

"§ 7. If in either of such towns trustees of gospel and school lots shall not have been chosen, or there be none in office, the share of such town shall be paid to the supervisor."

No. 55. All the powers and duties imposed upon the commissioners of common schools, by the act passed April twenty-seventh, one thousand eight hundred and twenty-nine, entitled "An act relative to moneys in the hands of overseers of the

poor," passed April twenty-seventh, one thousand eight hundred and twenty-nine, are hereby imposed upon the supervisors of towns. (*Sec.* 29, *chap.* 179 *of* 1856.)

The act herein referred to is as follows; the word "supervisor" being substituted in place of "town superintendent" wherever the latter is used:

AN ACT *relative to moneys in the hands of overseers of the poor.*

PASSED April 27, 1829.

"§ 1. It shall be lawful for the inhabitants of any town, in such counties as have abolished the distinction between county and town paupers, and in such counties as may hereafter abolish such distinction, at any annual or special town meeting, to appropriate all or any part of the moneys and funds remaining in the hands of the overseers of the poor of such town, after such abolition, to such objects and for such purposes as shall be determined at such meeting.

"§ 2. If any such meeting shall appropriate any such money or funds for the benefit of common schools in their town, the money so appropriated shall be denominated 'the common school fund of such town,' and shall be under the care and superintendence of the [supervisor] of said town.

"§ 3. If any such meeting shall appropriate such money or funds for the benefit of common schools, after such appropriation shall have been made, and after the [supervisor] shall have taken the oath of office, the overseers of the poor of such towns shall then pay over and deliver to the said [supervisor] such moneys, bonds, mortgages, notes and other securities remaining in their hands, as such overseers of the poor, as will comport with the appropriation made for the benefit of common schools of their town.

"§ 4. The said [supervisor] may sue for and collect, in their name of office, the money due or to become due on such bonds, mortgages, notes or other securities, and also all other securities by them taken under the provisions of this act.

"§ 5. The moneys, bonds, mortgages, notes and other securities aforesaid shall continue and be a permanent fund, to be denominated the common school fund of the town appropriating the same, the annual interest of which shall be applied to the support of common schools in such towns, unless the inhabitants of such town, in annual town meeting, shall make a different disposition of the whole of the principal and interest, or any part thereof, for the benefit of the common schools of such town.

"§ 6. The said [supervisor], whenever the whole or any part of the principal of said fund shall come to their hands, shall loan the same on bond, secured by a mortgage on real estate of double the value of the moneys so loaned, exclusive of buildings or artificial erections thereon.

"§ 7. The said [supervisor] may purchase in the estate on which the fund shall have been secured, upon the foreclosure of any mortgage, and may hold and convey the same for the use of said fund.

"§ 8. The said [supervisor] shall retain the interest of said common school fund, which shall be distributed and applied to the support of common schools of such town, in like manner as the public money for the support of common schools shall be distributed by law.

"§ 9. The said [supervisor] shall account annually, in such manner and at such times as town officers are required by law to account, and shall deliver to their successors in office, all moneys, books, securities and papers whatsoever relating to said fund, and shall take a receipt therefor, and file the same with the town clerk."

No. 56. All the powers and duties imposed upon town superintendents, by sections seventy-two, seventy-three, seventy-seven, eighty and one hundred and thirteen of chapter four hundred and eighty, Laws of one thousand eight hundred and forty-seven, are hereby imposed upon the supervisors of the towns. (*Sec.* 26, *chap.* 179 *of* 1856.)

Each of the sections above referred to will be found in its proper connections modified in conformity to No. 56.

OF THE ELECTION OF SCHOOL COMMISSIONERS.

No. 57. The boards of supervisors of the several counties in this state, composing each one assembly district, and also the boards of supervisors of each of the counties of Fulton and Hamilton, shall assemble at their usual place of meeting on the 3d day of June next, at noon, and elect for their county an officer to be called school commissioner. Such officer shall be elected by ballot, and shall hold his office from the day of his election until the 1st day of January, 1858. (*Sec.* 1, *chap.* 179, *passed April* 12, 1856.)

No. 58. The boards of supervisors of the several counties in this state having more than one assembly district, except the counties of New-York and Kings, shall meet on the 3d day of June next, at noon, and elect by ballot an officer to be called school commissioner, for each assembly district in their respective counties, who shall hold his office until the 1st day of January, 1858. (*Sec.* 2, *chap.* 179 *of* 1856.)

No. 59. The supervisors of the towns of Flatbush, Flatland, Gravesend, Newlots and New Utrecht, in the county of Kings, shall, on the 3d day of June next, meet at the usual place of meeting of the board of supervisors of said county,

and elect by ballot a school commissioner for that portion of said county not included within the city of Brooklyn, who shall hold his office from the day of election until the 1st day of January, 1858, and until a successor shall have been elected by the inhabitants of the said towns in the manner hereinafter provided. (*Sec.* 3, *chap.* 179 *of* 1856.)

No. 60. In the several counties composing each but one assembly district, the respective boards of supervisors shall have power and are hereby authorized, in their discretion, to choose two school commissioners whenever the number of school districts in the county shall exceed 140, counting two parts of districts, joint with other counties, one district. In case two commissioners shall be chosen as aforesaid, then the board of supervisors shall immediately proceed to divide the county into two districts or sections, having reference in such division, as nearly as may be, to equalize the territory and number of schools and pupils under the supervision of each commissioner, and also having reference to the density of population and the facilities for traveling. They shall make a description of the divisions established by them, and assign the charge of one of them to each of the commissioners then chosen. But no town shall be divided in the formation of any such district. Such description shall be filed in the office of the county clerk, and a copy thereof sent by him to the Superintendent of Public Instruction. (*Sec.* 4, *chap.* 179 *of* 1856.)

No. 61. In case any two persons shall have an equal number of votes for the office of commissioner, at the election hereinbefore provided for, the clerk of the board may give a casting vote, but, except for that purpose, shall have no vote in the proceedings. (*Sec.* 5, *chap.* 179 *of* 1856.)

No. 62. A certificate of the election of every commissioner shall forthwith be made by the clerk of the board of supervisors and filed in the office of the county clerk, and a duplicate thereof be sent by mail to the Superintendent of Public Instruction; and the county clerk, upon the filing of such certificate, shall forthwith give notice, in writing, to the school commissioners of their election, who shall, within ten days after such notice, take and subscribe the constitutional oath of office, and shall give notice of their acceptance to the Superintendent of Public Instruction, and enter upon their

duties immediately. They shall hold their office until the 1st day of January, 1858, and until their successors shall have taken and filed with the county clerk the like oath of office. (*Sec.* 6, *chap.* 179 *of* 1856.)

No. 63. At the annual general election held in the year 1857, and every three years thereafter, there shall be elected on a separate ballot, to be endorsed "School Commissioner," in the several assembly districts, and in the sections of single assembly districts formed and designated as hereinbefore provided, and in the towns of Kings county not included in the city of Brooklyn, a school commissioner for such district or section. All the provisions of law relating to the mode of voting and of canvassing the votes for county officers shall apply to and govern the election of such commissioners. The persons so elected shall enter into office on the 1st day of January, 1858, and shall hold office for three years, and until their successors shall have qualified according to law. Each of such commissioners, in counties where more than one is elected, shall take charge of that one of the assembly districts, or that one of the sections into which any county having but one assembly district may be divided, for which he shall have been elected; but may, upon the written request of the commissioner in charge of any other section of the same county, perform any duties therein which he might discharge in the section of his own residence. (*Sec.* 7, *chap.* 179 *of* 1856.)

The jurisdiction of the school commissioner is strictly limited to the district for which he is elected. But the commissioner may at times be necessarily absent, or he may from sickness or injury be unable to perform his duties, or he may be incapacitated by some legal disability. In such cases his written request will call to his aid another commissioner of the same county.

But whenever a commissioner is so called upon to exercise any powers or perform any duties out of his own jurisdiction, and the acts are of an important and permanent character, such as ought to be recorded or be put in writing, as for instance certificates, or alterations of districts, he should in every written instrument recite the written request, under which he is acting, substantially or in full. It would also be advisable to file such written request in the office of the county clerk,

for safe keeping and future reference, in case any question should arise as to the validity of his acts.

No. 64. Every commissioner shall have power, and it shall be his duty:

1. To visit and examine all the schools and school districts committed to his charge, as often in each year as shall be practicable; to inquire into all matters relating to the management, the course and mode of instruction, the books, studies and discipline of such schools, the condition of the school-houses, out-buildings and appendages, and of the districts generally; to advise and counsel with the trustees and other officers of school districts in relation to their duties, and particularly in relation to the construction, ventilation and warming of school-houses, and the improving and adorning of the school grounds connected therewith, and to recommend to such trustees and to the teachers employed by them the proper studies, discipline and management of the schools, the course of instruction to be pursued, and to examine into the condition of the district libraries. No commissioner shall act as agent for any author, publisher or bookseller, or shall directly or indirectly receive any gift, emolument or reward for his influence in recommending the use of any book or school apparatus or furniture of any kind whatever. Any act herein prohibited shall be deemed a violation of his official oath, and any offer or solicitation to such an act shall be considered an attempt to bribe and corrupt a public officer;

2. To examine persons offering themselves as candidates for teachers of public schools, in order to determine and to decide upon their capacity, and to grant them certificates of qualification, in such forms as shall be prescribed by the Superintendent of Public Instruction, which certificates, according to the terms thereof, shall be evidence of the qualifications of such teachers in the district of the county to which such commissioner shall be elected, or to which he shall be assigned in accordance with the provisions of this act;

3. To annul any certificate granted to any teacher by him or by his predecessor, or by any town or county superintendent, whenever such teacher shall be found deficient, and to examine, upon reasonable notice and opportunity of defense to the teacher, into all charges affecting the moral character of the teacher, which may be presented as a cause for annulling a certificate, by whomsoever such certificate may have

been granted, and he shall report every instance of such examination, the evidence which may be presented in the case, to the Superintendent of Public Instruction, immediately after the conclusion of such examination;

4. To organize and conduct at least once in each year, in his own district or in concert with the commissioner or com missioners of one or more adjoining districts in the same county, a teachers' institute, and to induce, if possible, all the common school teachers in his district to be present and take part in the exercises of such institute; and to perform the duties imposed by chapter three hundred and sixty-one, Laws of one thousand eight hundred and forty-seven, upon town superintendents, and to give the notice therein required to be given by the county clerk;

5. And generally by all means in his power to promote sound education, elevate the character and qualifications of teachers, improve the means of instruction, and advance the interests of the schools committed to his charge. (*Sec.* 8, *chap.* 179 *of* 1856.)

For greater convenience and a clearer understanding of the subject, the several subdivisions of this section will be commented upon separately:

1. To visit and examine all the schools and school districts committed to his charge, as often in each year as shall be practicable; to inquire into all matters relating to the management, the course and mode of instruction, the books, studies and discipline of such schools, the condition of the school-houses, out-buildings and appendages, and of the districts generally; to advise and counsel with the trustees and other officers of school districts in relation to their duties, and particularly in relation to the construction, ventilation and warming of school-houses, and the improving and adorning of the school grounds connected therewith, and to recommend to such trustees and to the teachers employed by them the proper studies, discipline and management of the schools, the course of instruction to be pursued, and to examine into the condition of the district libraries. No commissioner shall act as agent for any author, publisher or bookseller, or shall directly or indirectly receive any gift, emolument or reward for his influence in recommending the use of any book or school apparatus or furniture of any kind whatever. Any act herein prohibited shall be deemed a violation of his official oath, and any offer or solicitation to such an act shall be considered an attempt to bribe and corrupt a public officer.

The duties comprised in this subdivision may be stated under two heads:

I. Visiting and inspecting the schools.

II. Advising and counseling with the trustees and other school officers and with teachers.

I. The number of commissioners in the state, excluding the cities, is one hundred and thirteen. Each commissioner is required to visit all the schools in his district each year, as often as is practicable. The number of districts to be visited by any commissioner will, in a few cases, reach one hundred and fifty; perhaps, in most cases, will be less, and in some a little more, than one hundred. Allowing half a day to a visit, it will be found practicable to visit each school and school district in the state not less than three times a year. It would be found useful, where practicable, to assemble together two or three schools, and devote a whole day to their examination. A comparison of schools would excite emulation, and improve both scholars and teachers.

Having acquired a complete and familiar knowledge of the geography of his district, the commissioner should arrange a plan for visitation, as a judge does the terms of his courts, for a year or two years. It would be well to print his programme, and distribute it in every town and district, so that trustees and pupils and people may be prepared for his visits. The publishers of newspapers would be found ready to insert the programme of visitation in their papers, as an item of news highly important to their subscribers and readers.

In addition to this general notice, the commissioner should give a particular notice to the trustees and teacher of every school, of the day when he will be present and examine the school. He should invite the trustees to inform the parents of pupils of his visit, and urge them to attend.

Examination of the School: Preparatory to this, the commissioner should ascertain from the teacher the number of classes, the studies pursued by each, the routine of the school, the successive exercises of each class during each hour of the day, the play spells allowed, &c., and thus obtain a general knowledge of the school, which will be found greatly to facilitate his subsequent duties. Every commissioner is enjoined to call for and examine the list of scholars in the book which the statute requires the teacher to keep, in order that he may see whether the names are correctly and neatly entered. He will also examine the *day roll* and the *weekly roll*, which by the preceding regulations teachers are directed to preserve, and will ascertain, by the proper inquiries, whether they are exact in entering all who are present.

The commissioner will then hear each class recite the ordinary lesson of the day. It will then be examined on the subjects of study. Generally it will be better to allow the teacher to conduct the exercises and examinations, as the pupils will be less likely to be intimidated, and an opportunity will be given of judging of the qualifications of the instructors.

To enable him to compare the school with itself at another time, and with other schools, and to comply with the regulations hereinafter contained respecting the annual reports, the commissioner should keep notes of his observations, and of the information he obtains on all the subjects on which he is required to report; and he should particularly note any peculiarities which seem to require notice in the mode of instruction, in the government and discipline of the school, and the appearance of the pupils in respect to their cleanliness of person and neatness of apparel.

II. Advising and consulting with other officers of the district.

This duty is especially enjoined by the act upon commissioners. The law, in the broadest terms, requires them to advise and counsel the trustees and other school officers in relation to all their duties.

The performance of this duty will demand great care and circumspection. It should be constantly borne in mind that the office of an adviser and counselor is to ascertain facts and learn the true condition of things, and then to suggest and propose improvements and remedies. Interrogatories, judiciously aimed at abuses, errors, mistakes and omissions, will call attention to them as clearly as if they were condemned outright, and at the same time give no offence.

The advice and counsel needed will generally come under the heads of proper studies; the discipline and conduct of the school; the course of instruction; the elementary books; the erection of school-houses; and the ability of the district to maintain a school.

1. *The proper studies:* The proper studies vary with the age and advancement of the scholars. The great object of the common schools is, unquestionably, to instruct the youth of the state in the ordinary branches of a good English education. To spell, to read and write, should be the first care. As soon as a child can write, spelling and writing should be one exercise. The meaning of the words spelled should also be explained to the scholar, as a great assistance to the memory. Correct spelling and a clear comprehension of the words are essential to good reading. A distinct articulation of every syllable is the most important requisition. A correct, and not too forcible accent,

an utterance neither too rapid nor too slow, and a clear understanding of the subject, are also important requirements.

The commissioner will carefully note the capabilities of the scholars, and their grade of improvement, and advise that no studies be imposed or permitted until the pupil can enter upon them understandingly. The hill of science must be climbed with patient assiduity, step by step. Some may be able to step faster than others; but whoever attempts to overleap any of its acclivities, will be sure to fall back, and be compelled to start anew.

2. *The discipline and conduct of the school:* The commissioners cannot too strongly inculcate the necessity of a punctual and continuous attendance during school hours for the whole term. Teachers should be advised to insist upon this. The first hour of a session, in the morning or afternoon, should not be interrupted by the noisy dropping in, every few minutes, of truant and tardy children. The interruption is not the worst of the evil. The want of punctuality involves the loss of time that should be applied to study; and the tardy and often absent soon lag behind their associates, become disheartened, relax their efforts, and finally, in many cases, acquire a habit of irregularity, insubordination and negligence, which marks their character through life.

Order and system should prevail in the whole conduct of the school. The routine of recitations and other exercises should be regular and seldom changed. The pupils should give a ready obedience to the commands of the teacher, and a strict compliance with rules and regulations should be exacted. Pupils should be instructed that these commands, rules and regulations are not imposed upon them as a restraint or humiliation, but for their good; as the best means of expediting the sole business of the school, their acquisition of knowledge.

The commissioners should also observe whether the teachers possess the respect of their scholars, and whether their deportment in and out of the school is such as to preserve it. They should particularly note how the authority of the teacher is maintained; whether it is the result of a mild and conciliating, but firm and steady government, or whether it is an unwilling submission to the arbitrary rule of a high temper and the fear of the rod.

3. *The course of instruction:* The order of studies which long experience has decided to be best, and which is generally followed, is, the alphabet, spelling, reading, arithmetic, geography, history and grammar. To learn the names of things is among the earliest efforts of the infant

mind. It is the work of several years to master the simplest combinations of language. In teaching the elements of knowledge, therefore, great discretion and discrimination are necessary in graduating instruction to the capacity of pupils. Primary books should contain only familiar household words and the commonest forms of speech. When these have been mastered, others of a higher grade should be substituted; and the pupil should be all the time, insensibly but constantly, climbing an ascending grade.

The four simple rules of arithmetic are easily taught, not by arbitrary rules and a few examples, but by continual practice and repetition, with blocks or balls, by which the numbers are represented to the eye. The little boy who sells newspapers, or peddles peanuts and apples, will learn in a few weeks all the combinations of simple numbers, less than one hundred, without having ever heard of Colburn or Emerson. Make a purchase of him, and hand him a quarter of a dollar, and he will make his computation and give you the change as promptly as the readiest bank teller.

Geography, by means of maps, charts and globes, may be taught at a very early age. History requires a more advanced age. The study of history and geography may be combined. In the course of the reading lessons, and during the lesson in history, whenever a place is named the pupil should be required to point it out on the map. A daily newspaper may be of essential service in teaching geography and current history The use of a map, with a daily paper, will very soon make the pupils acquainted with all the principal commercial ports and political divisions of every part of the world. Geography and history, thus learned, would be indelibly impressed upon the memory. Biography, however, has a charm for the very young, and many brief narratives might be made a part of the school exercises. Grammar, treating of the structure and composition of language, is a difficult study, and should not be undertaken till the mind of the pupil has attained a maturity and strength capable of comparing, analyzing and combining phrases and sentences. To read, to speak and to write, correctly and elegantly, may all be learned without consulting a grammar. But a knowledge of English grammar is a very important part of a good common education, and its study a very useful exercise of the intellectual powers.

4. *Books of elementary instruction:* Within the last few years a great improvement has been made in elementary books. A great many series of books, elucidating and illustrating every branch of education in our common schools, have been published. None of them are so defective

as to require exclusion from the schools, and none of them are comparatively so superior to others as to merit particular recommendation. Trustees should be advised not to permit every new teacher to introduce a new set of books. A teacher is very poorly qualified who cannot use one set of text books as well as another. The trustees should exercise their authority, in relation to text books, to prevent any unnecessary change, and to preserve an uniformity. Classes of the same grade should have the same books.

Whenever the commissioner finds in any school a number of pupils of the same standing using different books, and classed separately, he should point out the evil, by showing how, if all had the same books, one class and one recitation would suffice for all, and the teacher's corrections and observations, repeated to several classes, might be limited to one, and much valuable time of pupils and teacher be saved.

Where the evil of a variety of text books prevails, it might not be advisable to compel uniformity by an immediate change of books. The trustees could however decide upon the text books to be used, and require every scholar who should afterwards have occasion to purchase a new book to conform to their decision.

A serious charge against county superintendents was, that they acted as book agents; how many, if any, were liable to such a charge cannot be determined. The present law relieves them not only from numerous importunities, but from the imputation of recommending text books on account of self-interest. It is very desirable that the books used in the same school should be uniform; but it is not desirable, among the first and prominent acts of the commissioners, to make a general change of text books. The reforms in the schools depend more upon the teacher than upon the influence of any series of books.

In ities and large villages, the adoption of uniform text books is a pecuniary advantage to the people, particularly to the transient population that frequently move from one district to another, and are generally least able to purchase new books. But the positive necessity of uniformity is not so apparent in adjacent rural districts. The inhabitants there do not often change their residence. It is not best to be indifferent as to the merit of text books, but to exercise prudence in recommending them. It is desirable that the people should understand that while the interests of their children command the first attention, the subject of expenses has also a fair consideration. Their confidence and coöperation will thus be secured.

5. School-houses and grounds: It is highly important that an earnest appeal be made to the trustees and inhabitants of the several school districts to give attention to the condition and improvement of school-houses and grounds. It is not possible to have schools high-toned and in healthy spirit, where inattention to comfort and beauty exists. If any element of character unfavorable to order and progress is called into morbid activity, it may often be traced to this source.

Health of body and vigor of mind should be carefully regarded. There should never be too long confinement in school rooms. Pure air is absolutely indispensable. It has been suggested, by distinguished writers on education, that six hours of daily confinement will impair the health of the great majority of pupils; that with the very best ventilation, no school room containing a score or more of children can be as healthy as the open air; hence, that no pupil should be kept in school for a longer time than is necessary to fix his attention upon his lessons. Growth and development of body are indispensable to the future well-being of the child and to realize the ideal of a well constituted man or woman. To this end the enjoyment of pure, fresh air, unconstrained attitudes of body, ample exercise and exhilarating play, are absolutely necessary; and the school-house, its location and grounds, should supply these wants. The mind of every child craves, receives and assimilates knowledge. We should so adapt our educational facilities that the desire for intellectual acquirement shall remain through life unimpaired. But very many children are so stupefied by the noxious air which they are compelled to breathe six hours every day, their vital appparatus so wearied, that they acquire an abhorrence of school and a disgust for study which are never eradicated. It is in the nature of things that any exertion, connected with physical suffering or oppressive sense of constraint, induces repugnance. Hence, in spite of the efforts employed to impress such children with an earnest conviction of the importance of a good education, they regard the school room as a prison, the vacations as seasons of delight, and adult age as the era of emancipation from an arduous bondage.

It is the vocation of the commissioners to discover and suggest a correction for these evils. When they visit school-houses, they should notice whether they are properly located. Many are situated on the line of the highway. They should be removed from it sufficiently far to escape the noise, dust and other inconveniences. If they are old, and a few boards and shingles and a little paint will improve their external appearance, and make them internally more safe and comfortable, surely

they should be applied. If the doors are broken or the seats and desks marred, they should be repaired and adapted to the physical comfort of the pupils; if the grounds need grading, it should be done; if pools of stagnant water are near, they should be drained and filled; if the proper fencing is required, let the subject receive prompt attention. Trees should be planted, shrubs and flowers should be set. Let free application be made of broom, brush and lime, to renovate the internal economy of the school room. Willing hands enough can be found in every school district to make all the improvements suggested, provided attention is directed to their importance. Certainly it is the school-house, if any building, which ought to be constructed and preserved with care and surrounded with pleasant scenery. Few parents would reside in a dwelling constructed with as little regard to beauty and comfort as are many of our school-houses. They should care as well for the place where their children congregate for instruction. They should be impressed with the conviction, that there the associations of nature and art should be attractive, to secure on the part of scholars a love for their school; that associations with order and beauty give birth, in tho minds of the young, to pure and holy emotions, whose happy influence will establish them in purity of desire and thought.

The attention of trustees should be called to this subject; and, if possible, they should be induced to appoint a suitable day for making necessary improvements and embellishments. Let the matrons and maids assist. Let the children participate in the work; they should share the pleasure and receive the lesson it would teach.

2. To examine persons offering themselves as candidates for teachers of public schools, in order to determine and to decide upon their capacity, and to grant them certificates of qualification, in such forms as shall be prescribed by the Superintendent of Public Instruction, which certificates, according to the terms thereof, shall be evidence of the qualifications of such teachers in the district of the county to which such commissioner shall be elected, or to which he shall be assigned in accordance with the provisions of this act.

The commissioners, being the only persons in their several districts authorized to grant certificates, should be prepared to make examinations, whenever making their round of visitations. To afford every reasonable accommodation to persons who may offer themselves, they should appoint some particular day and place, in each town, where they will be in readiness to examine teachers. It would also be well to give notice in the county papers in the spring and fall, just before the summer and winter terms generally commence, of certain times and places

at which applications may be made to them for licenses. Such notices would probably bring together several applicants, and thereby lessen the labor and time required for examination. One or more hours of each day might be set apart for this purpose, at the time of holding a teachers' institute.

The examination should be confined to ascertaining the qualifications of candidates, under three heads, viz: in respect, *first*, to moral character; *second*, learning; *third*, ability.

First. The testimonials as to moral character should be full and explicit, and should be from persons long and intimately acquainted with the applicant. This is no unimportant matter; and this department establishes it as a positive regulation, that no certificate is to be granted without entire satisfaction on this point. The training of youth must not be committed to persons of bad manners and questionable morals. Children will necessarily be more or less influenced by the example of their teachers, whose principles, therefore, should be such as to inspire confidence, and whose behavior worthy of imitation.

The commissioner will be careful not to push his inquiries beyond the field of morals, and extend them into the debatable ground of opinion, religious or political. All he can ask is that the applicant shall hold a fair reputation, free from the reproach of crime, or any taint of immorality. He would be justified in rejecting a noisy zealot, with manners rude, obtrusive and offensive, indicating uncurbed passions and unsound principles of conduct, liable to render him obnoxious to the inhabitants and unfit for a teacher of youth. The use of intoxicating liquors would be a serious objection to the character of a teacher. Temperance and sobriety should be demanded of every applicant. The objection is to the drinking of spirituous liquors, and not to drunkenness only. Persons under the influence of intoxicating drinks seldom act calmly and deliberately, but are liable to outbreaks of passion, moments of petulance, seasons of unnatural excitement or depression, entirely unfitting them for the government of a school or the management of young people.

The man who puts the inebriating cup to the lips of a child is instinctively execrated, and no voice is ever raised to justify the inhuman act. However besotted and degraded a man may be, he would be glad to have his children grow up pure, temperate and respected. In all nations, and all ages the corrupters of youth have been stigmatized as the worst enemies of society and of the state. A rule, therefore, which excludes from the office of teacher the habitual drinker of intoxicating

liquors, harmonizes with the better feelings of the inebriate himself, as well as with the general sense of mankind.

Second. As to the learning of applicants.

The improvement in text books, the use of charts and philosophical apparatus, and the general diffusion of knowledge, has raised the stan dard of qualification for teachers within the last ten years. Notwithstanding the faults and defects of our school system, there is abundant proof that it has produced fruit an hundred fold, and that our common schools, throughout the state, are now the best schools, and have almost entirely superseded private instruction. While, therefore, teachers must bear an examination on the same subjects as formerly, a much more minute, accurate and extensive knowledge of them is required.

In spelling, reading and penmanship, they are expected to be proficients, and they should also be well versed:

1st. In the definition of words;

2d. In arithmetic, mental and written;

3d. In geography;

4th. In the use of charts, globes and school apparatus.

5th. In the principles of English grammar; and,

6th. In the history of the United States, England, and of Europe generally, and in universal history;

7. In the science of government, at least they should know the character and operation of our own state and national governments.

In a large majority of the schools, a limited acquaintance with the last three heads is admissible, if the applicant is familiar with the other branches.

It may be advisable, also, if the power is exercised with due discretion, to grant certificates permitting the holder to teach a particular school, or to occupy the post of an assistant in departmental schools. The same extent and degree of knowledge is not needed to fill a subordinate place, and hear recitations in primary classes, as to take charge of a large school. Many summer schools may also be profitably intrusted to young girls, not qualified by age, education or experience to take charge of large schools.

In some schools, especially in high and union free schools, the range of examination might include the higher branches of mathematics, physiology and mental philosophy.

In all cases a familiarity with the current history of the present time, gathered from newspapers, should be required.

Third. Ability to teach. This implies something more than good character and mere learning. A faculty of imparting knowledge is essential to success as a teacher. The management of a school requires a certain tact in dealing with children; a patience and good nature not possessed by every one, and by very few in the same degree. The commissioners, by general inquiries and by pertinent questions to the applicant, on personal examination, may form a very fair judgment of his qualifications in these respects. Subsequently, their observations on visiting the schools will enable them to correct their judgment. Certificates, in the first instance, should be granted for a term not exceeding a year. A second one should not be given to a person whose ill nature, or petulance, or want of tact, or incapacity to impart instruction, disqualifies him for the proper government of a school.

Having satisfied themselves of the qualifications of the applicant, the commissioners will grant certificates, in the following forms:

Certificate of the First Grade.

TO ALL TO WHOM THESE PRESENTS SHALL COME: BE IT KNOWN, that I, , school commissioner for the district, in the county of , having examined A. B., and having ascertained his qualifications in respect to moral character, learning and ability to instruct a common school, no HEREBY CERTIFY that he is duly qualified, and that his experience in and devotion to the profession entitle him to the rank of a teacher of the FIRST GRADE, and he is accordingly hereby LICENSED to teach any common school in this district for three years from this date.

Given under my hand, this day of , in the year one thousand eight hundred and .

C. D.

Certificate of the Second Grade.

TO ALL TO WHOM THESE PRESENTS SHALL COME: BE IT KNOWN, that I, , school commissioner for the district, in the county of , having examined , and having ascertained his qualifications in respect to moral character, learning and ability to instruct a common school, DO HEREBY CERTIFY that he is qualified and entitled to the rank of a teacher of the SECOND GRADE, and he is accordingly LICENSED to teach common schools in any town in this district for the term of one year from this date.

Given under my hand, this day of , in the year one thousand eight hundred and .

C. D.

Third Grade—Limited Forms.

TO ALL TO WHOM THESE PRESENTS SHALL COME: BE IT KNOWN, that I, , school commissioner for the district, in the county of , having examined A. B., and having ascertained his qualifications in respect to moral character, learning and ability to instruct a common school, DO HEREBY CERTIFY that he is entitled to the rank of a teacher of the THIRD GRADE, and is qualified to teach the school in District No. , in the town of , in this district, and not elsewhere, and he is accordingly hereby LICENSED to teach the said school for the term of one year from this date.

Given under my hand, &c. C. D.

Another.

TO ALL TO WHOM THESE PRESENTS SHALL COME: BE IT KNOWN, that I, , school commissioner for the district, in the county of , having examined , and having ascertained qualifications in respect to moral character, learning and ability to instruct a common school, DO HEREBY CERTIFY that he is entitled to the rank of a teacher of the THIRD GRADE, and is qualified for the place of first (or second) assistant in the school in the district, in the town of , and is accordingly hereby LICENSED to teach in said school in that capacity for one year from this date.

Given under, &c. C. D.

Another.

TO ALL TO WHOM THESE PRESENTS SHALL COME: BE IT KNOWN, that I, , school commissioner for the district, in the county of , having examined A. B., and having ascertained his qualifications in respect to moral character, learning and ability to instruct a common school, DO HEREBY CERTIFY that he is entitled to the rank of a teacher of the THIRD GRADE, and is qualified to be a teacher in the primary department in the public schools in this district (or city), and he is accordingly hereby LICENSED to teach in that capacity for one year from this date.

Given, &c. C. D.

Certificates of the FIRST GRADE are intended for those who have had experience in their profession, who are endowed by nature with a peculiar tact or who have acquired a superior skill, in the management of youth and the government of schools, and should be granted to those only who can bear an examination in the whole range of studies taught in common schools. Every qualification heretofore and hereafter indicated as necessary or valuable in a teacher should be possessed by the applicant.

Candidates for the SECOND GRADE should be familiar with the rules of elocution and pronunciation, and be able to read with ease, intelligence and expression; they should write a bold, plain hand, and be able to teach some good system of writing; they should be fully versed in mental and commercial arithmetic, and well fitted to teach fractions, and the involution and evolution of roots; they should be able to teach book-keeping by single entry; they should know the common rules of orthography, and be able to parse any sentence in prose or poetry submitted to them, and to write grammatically, with correct spelling and punctuation, the substance of any passage which may be read to them; and be entirely familiar with the elements of physical, civil and political geography, as contained in any common school geography.

In short, the second grade certificates are intended for those who, with less experience and a more limited acquaintance with some of the higher branches, have, nevertheless, proved themselves able to impart to others what they have themselves acquired, and who have attained the skill necessary to govern a school, but who, on account of their youth or their want of opportunity, are fully prepared to teach only the ordinary studies considered essential in the common schools.

Candidates for the THIRD GRADE certificates should be required to spell correctly the words of any ordinary sentence dictated by the commissioner; to read distinctly and intelligently any passage from any ordinary reading book; to work readily questions in common arithmetic; to understand the elements of English grammar, and to parse any easy sentence in prose; to have a knowledge of the elements of geography, and the general outlines of the globe; to write a plain, open hand, and to exhibit good taste in the arrangement of words and paragraphs; to write letters intelligibly and grammatically, and to fold and superscribe them properly; and to know so much of morals and discipline as to appreciate the importance of self-government.

The third grade certificates are intended for temporary licenses, to be granted to novitiates and persons who for lack of experience or

ability have need to acquire the knowledge and skill necessary for higher positions.

But the best set of rules and regulations respecting the examination of candidates must, after all, be regarded only as a partial help to the commissioner. The wisdom and justice of his conclusions will depend mainly upon his own judgment. Whatever gift, or acquirement, or habit of thought and action may constitute his ideal of the true teacher, the applicants will nearly all come short of it. He can only look hopefully for an approximation, and grant his certificates to those who approach nearest to his ideal.

In pursuance of the discretion vested in the State Superintendent of Public Instruction, it is established as a regulation that no certificate shall be granted by any commissioner for a longer period than three years.

3. To annul any certificate granted to any teacher by him, or by his predecessor, or by any town or county superintendent, whenever such teacher shall be found deficient, and to examine, upon reasonable notice and opportunity of defence to the teacher, into all charges affecting the moral character of the teacher which may be presented as a cause for annulling a certificate, by whomsoever such certificate may have been granted, and he shall report every instance of such examination, the evidence which may be presented in the case to the Superintendent of Public Instruction, immediately after the conclusion of such examination.

By virtue of the 11th section of chap. 382 of 1849, which is unrepealed, a diploma from the State Normal School entitles its possessor to be deemed a qualified teacher anywhere in the state, and a certificate from a former county superintendent has the same effect within the county where it was granted.

The grounds for annulling a certificate are two: 1st. Deficiency in learning, and ability to teach; and, 2d. Immoral character.

1. On the first point the commissioner can satisfy himself by personal examination, or by observations made in school, or by proof of cruel conduct, and exhibitions of bad temper, and ungoverned passions. If the deficiency is within the commissioner's own knowledge, he should immediately reëxamine the teacher, if it relates to learning; and if to bad temper or bad morals, he should institute an examination, giving the teacher proper notice, and unless he satisfactorily explain his conduct, or exculpate his character, his certificate may be annulled; but if complaint of deficiency be made by others to the commissioner, he should give the teacher notice of some day and place at which he will examine him, and hear proof on behalf of both complainants and teacher.

When complaint is made of deficiency in moral character, full opportunity should be given the teacher for defence. He should be made acquainted with the precise charges affecting his character, and ample time allowed to prepare proofs and bring witnesses to explain or disprove them.

The refusal of any person to submit to an examination to ascertain his qualifications as to learning and ability, or a failure to appear and answer charges touching his moral character, after due notice of the time and place for a hearing, would be an admission of incompetency or immorality, as the case might be, sufficient to justify the annulling of his certificate.

The mode of procedure is not prescribed by the statute in express terms. It will therefore be safer to consider § 37 of chap. 480, Laws of 1847, as still in force, and as controlling the *manner* in which the school commissioner is to exercise this power.

The section is as follows:

"§ 37. The town superintendent may annul any such certificate given by him, or his predecessors in office, when he shall think proper, giving at least ten days' previous notice, in writing, to the teacher holding it, and to the trustees of the district in which he may be employed, of his intention to annul the same."

In 10th Barbour's Reports, 296, it was held by the supreme court that ten days' notice, and an order at the expiration of that time, were necessary to annul the certificate of a teacher. In that case, the superintendent examined a teacher on the last day of January, and, as he testified, decided him to be incompetent to teach, on account of his education being in some respects insufficient, and annulled his certificate. On the 2d of February he gave notice to the teacher that he intended to annul his certificate, and filed a similar notice with the town clerk, "to take effect February 12th." The court say that the order annulling the certificate must be in writing, and, commenting on the evidence of the superintendent, remark: "he doubtless formed the mental conclusion that he would annul the certificate, and gave notice to that effect. This was not a compliance with the provisions of the law. A notice of an intention to do an act is not an actual performance. The object of the statute in requiring notice was to fulfil the great requirement of justice, that no man shall be condemned unheard. The parties were entitled to a day before the superintendent, of which they were to have ten days' notice. To the teacher it was a matter of deep concern that he should have an opportunity of resisting a sentence of

degradation, affecting his character and his prospects of usefulness in life. It does not appear that the superintendent made any order at the expiration of the ten days mentioned in the notice. The contrary is conclusively to be inferred from the fact that he left the state on the 7th of February, and did not return until three weeks afterwards. It follows, therefore, that the certificate of the teacher was not legally annulled on the 3d of February, nor indeed on any day in that month."

It is undoubtedly the right of the commissioner to examine a teacher in respect to his literary qualifications, and to satisfy himself, by inspection of his method of conducting school exercises, as to his intellectual and moral capacity to teach, without previous notice. A very unfavorable impression might often be formed, and that justly, which the teacher could remove by showing facts not apparent upon the examination.

The notice may be in the following form, and should be served personally upon the teacher and upon one or more of the trustees in whose employment he may be.

Take notice, that it is my intention to annul the certificate of R. S. a teacher employed in District No. , of the town of for want of sufficient literary qualifications (or ability to teach, or whatever the cause may be), unless cause to the contrary shall be shown on or before the day of

A. B.,
School Commissioner.

At the expiration of the notice, if the commissioner determine to annul the certificate, he should make an order, substantially as follows:

Notice having been given by me in writing, at least ten days previous to the day of , to R. S., a teacher employed in District No. , in the town of , and also to the trustees of such district, of my intention to annul the certificate of such teacher for want of sufficient literary qualification (or ability to teach, or as the case may be), unless cause to the contrary were shown on or before the day aforesaid, and no cause having been shown (or if the parties have appeared to show cause, after hearing the proofs and allegations of the said R. S. (or the trustees), and mature deliberation being thereupon had), it is hereby ordered that the certificate of qualification of the said

R. S. as a teacher of common schools be, for the cause aforesaid, and the same is hereby annulled. Dated this day of .

A. B.,
School Commissioner for, &c.

2. If charges affecting the moral character of the teacher be presented, the notice should be:

Take notice that the following charges, affecting the moral character of R. S., a teacher employed in District No. , of the town of , have been presented by James Jackson, of the town of , as a cause for annulling the certificate of said teacher, viz: (Here recite the charges, in which the precise nature, time, place and circumstances of the offences imputed to the teacher should be stated); and that I shall proceed to examine into the charges aforesaid, and to hear the defence of the said teacher at o'clock of the day of , at , in the town of .

C. O.,
School Commissioner for , etc.

It is believed that a commissioner ought not to subject a teacher to the notoriety of a public accusation, unless some person shall make complaint to him, and sustain it by his own oath or that of witnesses whom he produces. He should ascertain that there is probable cause for proceeding in substantially the same manner as a justice of the peace, to whom application is made for a criminal warrant. He may, for this purpose, administer oaths, examine the complainant and his witnesses orally, and reduce their testimony to writing.

The charges must be direct and positive of such offences as would justify the annulling of the certificate. They ought to be sufficiently particular to apprise the teacher of what he is accused, and enable him to prepare for defence; for example, if an immoral habit, as profane swearing, licentiousness, intemperance in the use of spirituous liquors, is charged, one or more instances of it should be specified.

When the time for examination arrives, it is for the complainant first to adduce evidence in support of his charges. The accused is not bound to offer any testimony until something is proved against him by witnesses whom he has the opportunity to cross-examine. The preliminary complaint is only for the purpose of putting him upon trial; but is not evidence upon the trial, unless for the purpose of discrediting the witnesses, by showing that they have testified differently as to the same transaction.

As the commissioner is required to report the evidence to the State Superintendent, he should take full minutes, as it is given, as nearly as possible in the language of the witnesses. It would be well, also, though not indispensable, that the testimony of each witness should be read over to and subscribed by him as soon as he has concluded.

The statute contemplates a decision by the commissioner, the testimony being reported to the State Superintendent for review, only in case an appeal is brought from the decision.

The commissioner should draw two copies of his instrument annulling a certificate, one of which he should keep, and the other serve upon the teacher. The trustees, also, should be notified of the fact immediately, in order to save the district from the loss of the public money consequent upon the employment of a teacher without a licence.

The commissioners are instructed to report, once in three months, to this department, the names of all teachers whose certificates have been annulled, with the cause of such proceeding.

They should also keep a register of the names of all persons to whom they grant certificates of qualification, with the date of each certificate and the term and place for which it was given; and also the names of all persons whose certificates are annulled by them, with the date, and the general reasons therefor.

The proceedings of the commissioners, in respect to the granting and annulling of certificates, are subject to appeal to the State Superintendent, by any person feeling himself aggrieved.

4. To organize and conduct at least once in each year, in his own district or in concert with the commissioner or commissioners of one or more adjoining districts in the same county, a teachers' institute, and to induce, if possible, all the common school teachers in his district to be present and take part in the exercises of such institute; and to perform the duties imposed by chap. 361, Laws of 1847, upon town superintendents, and to give the notice therein required to be given by the county clerk.

By this provision of law, all the duties imposed chap. 361, Laws of 1847, upon the county clerk and town superintendents, are charged upon the school commissioner. It is made his duty to organize and conduct an institute, at least once in each year, in his own district, or in concert with the other commissioners in the same county. Probably a single institute in each county will answer every desirable purpose.

AN ACT *for the establishment of teachers' institutes.*

Passed November 13th, 1847, "three-fifths being present."

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

§ 1. The treasurer shall pay, on the warrant of the comptroller, to the order of the several county treasurers of this state, the several sums of money hereinafter mentioned, not exceeding sixty dollars annually to any one county, from the income of the United States deposit fund, to be expended for the use and benefit of teachers' institutes, as hereinafter provided.

§ 2. Whenever a majority of town superintendents of common schools in any county in this state unite in a recommendation, and file with the county clerk thereof a certificate, signifying their desire that a teachers' institute should be organized in such county for the instruction and improvement of common school teachers for such county, it shall thereupon be the duty of such clerk forthwith to appoint three town superintendents of the county, and notify them of their appointment, to constitute an advisory committee, to make the necessary arrangements for organizing and managing such institute, and such clerk shall also immediately give such public notice in such manner as he may deem most proper to the teachers of common schools of the county, and to others who may desire to become such, specifying a time and place when and where the teachers may meet and form such institute.

§ 3. Whenever any institute shall have been organized, as herein provided, it shall be the duty of said committee and they shall have power to secure two or more suitable persons to lecture before such institute upon subjects pertaining to common school teaching and discipline, and various educational subjects which may be deemed calculated to qualify common school teachers, and to elevate the profession of teaching, and to improve common schools; and said committee shall keep an accurate account, in items, of the necessary expenses of such institute in procuring said lecturers, and otherwise, and shall verify said account by affidavit, and deliver the same to the county treasurer, to be audited by and filed with him when application shall be made to such treasurer, as hereinafter provided.

§ 4. Whenever any county treasurer shall receive satisfactory evidence that not less than fifty, or in counties of under thirty thousand population, then not less than thirty teachers and individuals intending to become teachers of common schools within one year, shall have been in regular attendance on the instructions and lectures of the institute in the county, during at least ten working days, he shall audit and allow the account which shall be presented to him by the committee, as aforesaid, and shall pay over to said committee the amount so audited and allowed, not exceeding sixty dollars in any one year, to be disbursed by said committee in paying the expenses incurred by the institute, as aforesaid.

§ 5. Every such committee shall annually transmit to the State Superintendent of common schools a catalogue of the names of all persons who shall have attended such institute, with such other statistical information and within such time as may be prescribed by said State Superintendent.

§ 6. This act shall take effect immediately.

The commissioner, or commissioners where two or more unite, will give the requisite notice, and then proceed to organize and conduct an institute, exercising the same powers and performing the same duties as, heretofore, the advisory committee, under the same act.

The commissioners will keep an accurate account, in items, of all the expenses attending the institute, verify the same by affidavit, and present it to the county treasurer.

Form of Account and Affidavit.

Expenses attending the formation and holding of a teachers' institute, at , in the county of , beginning on the day of , 18 , and ending on the day of , 18 .

Advertising notice (see voucher No. 1),	$1 50
Use of room (see voucher No. 2),	3 00
Fires and attendance (see voucher No. 3),	10 00
Paid Mr. for lectures and instruction (see voucher No. 4),	50 00
Stationery (see voucher No. 5),	5 00
	$69 00

STATE OF NEW-YORK, } ss.
County of , }

John Doe, school commissioner for the district of said county, being duly sworn, says that the above account is correct, and that the several items therein charged comprise the expenses incurred by him in the formation and holding the teachers' institute in this county, at the time and place named, and that no part of said account has been paid or satisfied.

JOHN DOE.

Sworn before me, this day of , 18 . }

RICHARD ROE,
Comm'r of Deeds.

A list of all the teachers, and individuals intending to become teachers, attending the institute, must be kept by the commissioner and

verified by his affidavit. Upon presenting this, and the account aforesaid, to the county treasurer, he is bound to audit the account, and pay not exceeding sixty dollars, provided it appears that not less than fifty, or in counties of under 30,000 population, then not less than thirty persons, above described, have been in regular attendance upon the teachings and lectures of the institute during ten working days.

In the location of the institute, reference should be had to the convenience and pecuniary interests of the persons who are to attend it.

The time of holding its terms should be fixed with a view not to interfere with the common schools, but at such season as will allow common school teachers the most leisure to attend the institute.

The commissioner or commissioners should, before giving notice of the time and place, secure the services of two or more suitable persons to lecture before the institute, and help to conduct the exercises. The commissioner will have the general direction of the exercises, and may employ as many persons as may be necessary, to lecture, and to take charge of classes to be instructed in subjects pertaining to common schools, teaching and discipline.

In pursuance of the fifth section of the act, the commissioners are required to report to this department:

1st. A catalogue of the names of all the persons who shall have attended such institute, their place of residence and post-office address;

2d. The names of the officers of the institute and the lecturers;

3d. A statement of the subjects upon which lectures have been delivered;

4th. A statement of the classes into which the institute was divided, the studies pursued and the text books used;

5th. The time the institute was organized, the length of such term held and the time and place fixed for holding future terms;

6th. A copy of the accounts rendered to the county treasurer;

7th. It is recommended that a committee be appointed to make a report upon the condition of the school and the general state of public instruction in the county, and that a copy of that report be transmitted to the State Superintendent;

8th. Any other information that the committee may deem interesting or useful, or calculated to promote the cause of common school education.

This report should be transmitted to the State Superintendent on or before the first day of December in each year.

The commissioner, in addition to the published notice required by law, should also address a circular to every teacher in his district, urging all to attend the institute.

If the state, as there is very little reason to doubt, shall continue its annual appropriation, the institute will become a part of the common school system. Teachers cannot fail to derive much benefit from the lectures, the instructions and conversations of the institute. By comparing the various modes of teaching and government; by discussing all the topics of practical duty; by a critical examination of different text books, and by aiding and counselling each other, much may be done to promote the success of the schools. Not the least among the advantages to be gained by these annual gatherings, are the mutual acquaintances formed, the good feeling engendered, the encouragement afforded, and the reciprocal instruction imparted, which will serve to unite and to stimulate all to vigorous effort in the common cause. If the fifteen thousand teachers in this state will form themselves into town and county associations, and combine all their energies, and act unitedly and harmoniously, what project for the improvement of common schools, in whose excellence and usefulness are centered the hopes of the present and of future generations, could they not urge upon public attention, with a concentration of sentiment and a weight of influence which would command the respect and secure the coöperation of all good men.

5. And generally, by all means in his power, to promote sound education, elevate the character and qualification of teachers, improve the means of instruction and advance the interests of the schools committed to his charge.

The commissioners are not expected to limit their labors to a bare performance of the duties prescribed by law. They are, on the contrary, expected to devote all their time to subjects connected with education. The preparation of lectures, correspondence with teachers and school officers, the getting up and management of institutes, the taking of evidence in appeal cases, the reconcilement of district controversies, the procurement of statistical information, the making out of the annual reports, all require diligent study during the intervals of active duty.

No. 65. All the duties and requirements of law now imposed upon town superintendents, in reference to the formation, alteration, dissolution, consolidation and annulling of school districts, the building of school-houses, the selection and change of sites, and in relation to the sale of school district

property, and the disposal and apportionment of the moneys arising therefrom, are hereby imposed upon the school commissioner, in respect to the several towns within his jurisdiction; and he shall pay over the said moneys to the supervisors, to be by them paid to the districts or parts of districts which may be entitled to receive the same. (*Sec.* 25, *chap.* 179 *of* 1856.)

No. 66. Any commissioner may, at any time, resign his office to the clerk of the county in which he was elected; and in case of vacancy from such cause, or by death, removal from office or from the county, or refusal to accept, the county clerk shall give immediate notice to the county judge of such county, who shall appoint a successor to fill such vacancy till the next following general election, when a successor shall be chosen by the electors, as hereinbefore provided. (*Sec.* 9, *chap.* 179 *of* 1856.)

It is thought that the person appointed to fill a vacancy can only hold the office until such time as the officer chosen by the people to fill the vacancy shall have taken the oath of office.

Persons elected at the general elections would be subject to the following provision:

§ 3. All officers elected by the people, unless they shall be elected to supply vacancies then existing, shall enter upon the duties of their respective offices on the first day of January following the election at which they shall be chosen. (*R. S.*, 3*d ed.*, *part* 1, *chap.* 5, *art.* 1, § 3; *see also Const.*, *art.* 10, § 6.)

No. 67. The commissioners shall be subject to such rules and regulations as the Superintendent of Public Instruction shall from time to time prescribe, and appeals from their acts and decisions may be made to him in the same manner and with like effect as in cases now provided by law. They shall make reports annually to the Superintendent of Public Instruction, at such times as shall be appointed by him, containing such information as he shall require; and for that purpose the annual reports of the trustees of school districts shall be made to them, and be deposited with the town clerks of the town in which the school-house of each district is situated, from whom the said commissioners shall obtain the same. Henceforth the trustees of joint districts, composed of territory lying in two or more towns in the same county, shall be required to make but one annual report, in such form as the

State Superintendent of Public Instruction shall prescribe. The reports of the trustees, after the commissioner shall have made his abstract therefrom, shall be properly arranged, filed, and, together with a copy of his own annual report, shall be deposited in the office of the county clerk for safe keeping. The county clerks shall not be required to make returns or abstracts of such reports. (*Sec.* 10, *chap.* 179 *of* 1856.)

The annual reports of the trustees of school districts are required to be made between the 1st and 15th days of January in each year, and filed with the town clerks. The commissioner should call for them promptly; and if any districts are delinquent, should at once proceed to ascertain the cause. It should be his care, if possible, to cause a report to be made by every district in his jurisdiction, and he should aid trustees who may need his counsel and advice.

The reports of the commissioners are required to be made at such times and to contain such statistical information as the State Superintendent shall prescribe. Blank forms will be annually prepared and distributed to the commissioners, and circulars will be addressed to them, with instructions as to the information required and the time when the reports must be completed, and deposited in the mail or sent by express to this department.

It must be borne in mind that the State Superintendent is directed to send in his annual report to the legislature, dated December 31st of each year. The reports of commissioners must, therefore, be prepared two or three months previous to this time; negligence on the part of one, two or three commissioners will necessarily cause serious delay and embarrassment to the department, as the superintendent cannot comment upon results until all the details are received.

No. 68. Every commissioner shall have power to take affidavits and administer oaths in all matters pertaining to common schools, but without charge or fee; and, under the direction of the Superintendent of Public Instruction, may hear and report to him testimony in all cases of appeals. (*Sec.* 11, *chap.* 179 *of* 1856.)

It was not the design of this section to supercede the present mode established by regulation of presenting testimony upon appeals in the form of written affidavits, but to enable the superintendent to obtain additional light, where the written evidence is conflicting, ambiguous or

otherwise unsatisfactory, by the oral examination of witnesses before a commissioner. Where the superintendent conceives this necessary or desirable, an order will be made in the case, referring it to the proper commissioner to hear and report all testimony which may be produced before him by the respective parties to the appeal, or the testimony of particular witnesses named in the order, or testimony in relation to particular issues specified. The range of inquiry will be limited by the terms of the order.

Upon receiving the order, the commissioner will give notice to both parties of the time and place at which he will hear the evidence to be produced by them respectively, if the reference is general, or of the witness named, or in relation to particular issues or subjects of inquiry, if the reference is limited in either respect. At the time and place appointed the commissioner will administer an oath to the witnesses in the following form:

You swear (or declare and affirm) that the evidence you shall give upon this hearing, under the order of the Superintendent of Public Instruction, on the appeal of (reciting the title of the proceeding as the same is given in the entitling of the order), shall be the truth, the whole truth, and nothing but the truth, so help you God.

The evidence of each witness on his direct examination should be reduced to writing, read over to the witness, any additions or corrections he desires to make stated (without erasing anything that has been written), and then subscribed by the witness and certified by the commissioner, before the witness is cross-examined. The cross-examination is to be taken, corrected, subscribed and certified in the same manner.

At the conclusion of the examination the commissioner should endorse or under-write upon the original order "The execution of this order appears by the depositions hereto annexed. A. B., Commissioner." He should then append to the order and return therewith to the superintendent the depositions in the following form:

[Title of the case as in the order.]	Depositions taken on the day of , at , under an order of the Superintendent of Public Instruction, dated , before A. B., school commissioner for the Assembly District of county.

C. D., a witness produced, was duly sworn by said commissioner, and on being orally examined by for the appellant (or respondent), deposeth as follows: I reside in the town of ; I was present at a meeting held in District No. , on the 10th day of May, 1856, &c., &c.

On hearing the above read, the witness further deposeth: I want to be understood that I was not present at the meeting (give the witness' additions and corrections to his testimony as reported).

(signed) C. D.

Subscribed and sworn to this day of , before me,

A. B., *Commissioner.*

On being cross-examined by for the respondent, the witness above named deposeth: I saw James Jones at the meeting to which I have testified. He was outside of the building when the meeting was organized, &c., &c.

The commissioner has no power to compel the attendance of witnesses. If any of those named in the order do not appear, he should take and report the evidence of the parties, showing their refusal or other reason for non-attendance.

No. 69. The several boards of supervisors, whenever in their opinion the interests of education in their respective counties will be promoted thereby, may increase the salary of any commissioner to such sum as they may deem reasonable and just; but the supervisors of the wards in any city not included in a school commissioner's district shall not vote upon such questions; the increase over and above the five hundred dollars, payable to him from the United States deposit fund, to be a charge upon the county or district over which such commissioner may have jurisdiction; and the same shall be assessed annually upon the towns composing such county or district, ratably, according to the corrected valuations of the real and personal estate of such towns. (*Sec.* 13, *chap.* 179 *of* 1856.)

No. 70. The boards of supervisors are hereby authorized and required to audit and allow to such commissioners such sums as they may have incurred for necessary expenses by them in the performance of their official duties, to an amount

not exceeding one hundred dollars. (*Sec.* 14, *chap.* 179 *of* 1856.)

No. 71. The several cities in this state which, under special acts, already elect superintendents of common schools, or whose boards of education choose clerks doing the duty of supervision under the direction of the board of education, shall not be included in any commissioner's district created by this act or authorized to be formed by the board of supervisors; and the several boards of supervisors, in counties in which such cities are joined to towns in the formation of an assembly district, may divide the county, exclusive of such cities, into such school commissioners' districts as they may deem advisable, but no town shall be divided in forming such districts. (*Sec.* 16, *chap.* 179 *of* 1856.)

OF THE DUTY OF TOWN CLERKS.

No. 72. It shall be the duty of the town clerk of each town:

1. To receive from the present town superintendents all books, maps and papers appertaining to his office, and to file and keep them in the town clerk's office;

2. To receive from the supervisor the certificates of apportionments of school moneys for the town, and record them in a book to be kept for that purpose;

3. To notify the trustees of the school districts when such estimates and appropriations are filed in his office;

4. To see that the trustees of common schools make and file with him their annual reports within the time prescribed by law;

5. To distribute to the trustees of school districts all blanks and circulars which shall be delivered or forwarded to him by the commissioner for that purpose;

6. To receive from the supervisor, and record in a book kept for that purpose, the annual account of the receipts and disbursements of school moneys required to be submitted to the town auditors and filed with the said clerk, and to send a copy thereof by mail to the commissioner. (*Sec.* 28, *chap.* 179 *of* 1856.)

The duties of the town clerk, as a member in certain cases of the board for the formation and alteration of districts, are discussed under that head. It may be his duty also to order a special district meeting in the case mentioned in § 66, chap. 480, Laws of 1847. (*No* 87, *post*).

OF THE FORMATION AND ALTERATION OF SCHOOL DISTRICTS.

No. 73. It shall be the duty of the [school commissioner, in respect to the several towns within his jurisdiction]:

1. To divide the town into a convenient number of school districts, and to regulate and alter such districts as hereinafter provided;

2. To set off by itself any neighborhood in the town adjoining to any other state of this Union, where it has been usual or shall be found convenient for such neighborhood to send their children to a school in such adjoining state;

3. To describe and number the school districts, and to deliver the description and numbers thereof, in writing, to the town clerk, immediately after the formation or alteration thereof;

4. To deliver to such town clerk a description of each neighborhood adjoining to any other state, set off by itself. (*Sec.* 8, *chap.* 480 *of* 1847, *school commissioner being substituted for town superintendent, in conformity to No.* 65.)

This section, so far as it concerns the formation and alteration of districts, relates only to such districts as are formed of territory lying wholly within the jurisdiction of the school commissioner acting under it, and the formation or alteration of which, moreover, does not affect any other district which is wholly or partly in the assembly district or section of another school commissioner. If the district to be formed, altered or regulated includes a part of a town under the jurisdiction of another commissioner, or involves the division of a joint district, any part of which lies within such other jurisdiction, it is necessary that all the school commissioners should unite as a board in making the order for such alteration.

The case is now exceedingly rare in which a new district can be formed, or any district be altered, without its necessarily involving an

alteration of some other district, and thus rendering it necessary to procure the assent of trustees, or to suspend the operation of the order, as provided in § 45, chap. 480, Laws of 1847 (*No.* 76, *post*).

Where, in consequence of the existence of doubts in respect to the true boundaries of a district, it becomes expedient for the commissioner to make a new description thereof, it should be regarded as an *alteration*, and the written consent of the trustees of all the districts conterminous to the new described boundaries should be subscribed to the order, or notice should be given to them of such order, and that it will take effect at the expiration of three months after the service of a copy thereof. This rule was settled in a case where an appeal was taken from an order describing the boundary of a district, and in which the answer set up that the boundary thus established was not a new one, but only the record of a line which had always existed as the true boundary, though the written evidence was wanting. The principle is, that the commissioner has no power to adjudicate what *is*, but only to determine what *shall be* the boundary for the future.

A preliminary notice of the commissioner's intention to make an alteration of a school district should in all cases be given to the trustees of every district to be affected thereby, before proceeding to make any order in the premises. (*See Digest, ante page* 91, *and the comment under the next section, No.* 74.)

It is of extreme importance that the description of a district should be so complete and definite that a surveyor, at any future day, may be able to run its boundaries without reference to any other document than the order forming, altering or describing it. For this purpose the exterior lines should be defined by reference to natural monuments, marked trees, creeks, &c., or to township lines of historical notoriety, such as the lines of the great original subdivisions into lots, or the course of highways. Where these fail, the courses and distances as ascertained by the compass and chain should be given. The practice of stating the boundary as that of "the farm now in the occupation of C. D.," or by means of similar designations, frequently renders it very difficult to ascertain them, as the occupation of land is continually shifting. In Gray *v.* Sheldon, 8th Verm. R., 402, a resolution "to set off Isaac Gray, Jr., to school district No. 3," was held void on the ground that school districts should be defined by geographical limits, and be made to consist of *territory* and not of *persons*.

The form of an order may be as follows:

In the matter of the formation of District No. , in the town of , county of , and the consequent alteration of Districts No. in said town, and No. in the town of (*or* in the matter of the description of District No. , as the case may be),

It is hereby ordered, by the undersigned school commissioner for Assembly District No. 3, of the county of , that a new school district be formed, to consist of part of District No. , in the town of M., and part of District No. , in the town of P., which new district is hereby numbered [23], and is bounded as follows: Beginning on the east bank of Allen's creek, at the point where the same is intersected by the north line of the highway leading from Brighton to Pittsford; thence northeasterly along said creek to its junction with Irondequoit creek; thence southeasterly along Irondequoit creek to the west line of the town of Brighton; thence south along the boundary line between the towns of Brighton and Penfield to the north line of Pittsford; thence west on said north line to the state road; thence north along the state road to its intersection with the highway first above mentioned; thence northwesterly along said highway to the place of beginning.

In case the order is made with the consent of the trustees of the districts affected thereby, or of any such districts, the evidence of such consent should be annexed to the order in substantially the following form:

At a meeting of the trustees of District No. , in the town of , county of , called for the purpose of considering certain proposed alterations thereof, held on the day of , at which were present J. D. and R. S., and in the absence of P. T., a trustee, who, having been duly notified of such meeting, failed to attend, it was

Resolved, That the consent of the trustees of District No. , in the town of , be and hereby is given to the alteration of said district by an order bearing date , made by , school commissioner for the Assembly district (or section) of county (or that said district be so altered as to be hereafter bounded as follows, describing the new boundaries fully).

In witness whereof, the undersigned, a majority of the said trustees, have hereunto subscribed our hands this day of .

J. D., } *Trustees.*
R. S., }

The consent of the trustees must be absolute, not conditional. (*See Digest, ante, p.* 10.)

In case a majority of the trustees of any district affected by the order refuse their consent, the order should recite that fact, and that it will not take effect until after three months' notice, in writing, to some one or more of such trustees, as follows:

"The trustees of District No. not having consented to this order, the same will not take effect, *in respect to such last mentioned district*, until after three months' notice, in writing, shall be given to some one or more of such trustees."

Notice should in that case be immediately served upon one or more of the trustees, selecting for that purpose a trustee who is hostile to the alteration, and not one who was in favor of consenting. (*See ante, pp.* 1, 2 *and* 89.) A written admission of the service of such notice, signed by the trustee or trustees on whom it is made, should be annexed to the original order, and filed with it in the town clerk's office, so that the entire history of the transaction and the date at which the order took effect may be ascertained at any subsequent time, without inquiry elsewhere or the examination of other documents.

All orders making alterations in joint districts must be put on record in all the towns of which such districts constitute a part, even though such alterations do not directly affect persons residing in all the towns in which they are recorded; "Thus, although no inhabitant of Tyrone was taken from (Joint) District No. 6 to form No. 8, the order, signed by the commissioners of both towns, should have been recorded in Tyrone, because No. 6 lies partly in that town. It is clear that unless such records are made, the commissioners of one town can never know the boundaries of a joint district without resorting to records in another town, over which they have no control." (*Per. Dix, Supt. Com. Schools Dec., p.* 175.)

No. 74. In the erection or alteration of a school district, the trustees of any district to be affected thereby may apply to the supervisor and town clerk to be associated with the [school commissioner], and their action shall be final, unless duly appealed from; the compensation of the supervisor and

town clerk, when thus associated, shall be the same as that of the town superintendent. (*Sec.* 43, *chap.* 480 *of* 1847, *modified by substituting school commissioner for town superintendent, in conformity to No.* 65.)

This section was originally § 3, chap. 133 of 1843, and was then first enacted upon the substitution of a town superintendent in the place of the former town board of commissioners of common schools. In so important a matter as the alteration of a school district, the legislature deemed it right that the districts to be affected should have the benefit of the consultation and judgment of a board composed of three persons, whenever, for any reason, they elected to associate them, in preference to trusting their interests to the sole jurisdiction of the town superintendent. As the powers of the school commissioner in these cases are derived only from the transfer to him, by No. 65, of the powers formerly vested in the town superintendents, it is to be inferred that the school commissioner is to exercise his jurisdiction either alone or in conjunction with the supervisor and town clerk, in the same manner as a town superintendent would have done, and that the decisions in respect to the powers and duties of the latter, under this section, are applicable to the former.

Section 31, chap. 480 of 1847, which established the compensation of town superintendents, and to which the above section refers, for that of the supervisor and town clerk when acting under it, is as follows:

§ 31. The town superintendent shall be entitled to receive one dollar and twenty-five cents per day for every day actually and necessarily devoted by him in his official capacity to the service of the town for which he may be chosen, the same to be paid in like manner as other town officers are paid.

The statute has not prescribed the steps to be taken for convening the supervisor, town clerk and school commissioner to deliberate upon the alteration of a district. It has been decided that this board is not an appellate tribunal, to sit in review of a decision made by the school commissioner (*see Digest, ante, p.* 96), but is to exercise its jurisdiction upon the proposed alteration as an original question. The school commissioner cannot call upon the supervisor and clerk to act with him, for the jurisdiction of the latter depends upon an application to them by the trustees of some district to be affected. In order to give them the opportunity to make such application, and that it may be done or the option waived within a reasonable time, the school commissioner, before

making any alteration, should serve upon one or more trustees of each district to be affected thereby a written notice, specifically describing such alteration, in substantially the following form:

To the trustees of District No. , in the town of :

Take notice, that I intend on the day of next, at (specifying a convenient place, and a time sufficiently remote to enable the trustees to make application to the supervisor and clerk, and for the latter to be prepared for the meeting), to make an order for the alteration of District No. , in the town of , so that its boundaries shall thereafter be as follows, viz: (Here specify the proposed boundaries of the district, as altered, in the manner recommended under No. 73).

You are therefore requested to meet without delay and to adopt a resolution consenting to the above proposed alteration, in which case you will please furnish me, at the time and place above mentioned, with a copy thereof, certified under the hands of a majority of you, *or* to adopt a resolution applying to the supervisor and town clerk of the town (or *towns* if the district is a joint one) of to be associated with me at the time and place above mentioned in determining upon the propriety of such proposed alteration. In the latter case you will please transmit copies of such resolution, certified under the hands of a majority of you, to the supervisor and town clerk without delay, together with notice of the time and place above stated at which such alteration will be made by me in case of their non-attendance.

The determination of the trustees to associate the supervisor and clerk, like every other official act, should result from the resolution of a majority, adopted at a meeting at which all are present or which the absent one has been duly notified to attend. No jurisdiction is obtained by the supervisor and clerk upon the application of less than a majority. (*See Digest, ante, p.* 88.) Their want of jurisdiction vitiates the action of a board in which they may assume to take part. Upon this point the language of Vice-Chancellor Sandford (2 *Sand. Ch. R.*, 229) is very instructive. Discussing the effect of certain proceedings of a church council at which a majority of the trustees were present and in which they unanimously concurred, but in which the minister, elders and deacons also participated, he says: "the trustees in this case are by the charter the select class or body which is to exercise the corporate functions. In order to exercise them, they must *meet as a board*, so that they may hear each others views, deliberate and then decide. Their separate

action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class in which they are but a component part, be a valid corporate act. In thus acting they are not distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon the trustees which in their proper board would be unheeded; and no one can say with certainty that their vote in the latter event would have been the same."

If the trustees have given the proper notice to the supervisor and clerk, the school commissioner can at the time and place appointed proceed to act in conjunction with either of them, in case the other omits to attend. It is true that the general rule is, when persons are appointed by the law to act as special tribunals of a quasi-judicial character, then both parties are entitled to the presence of all the judges, and to have the benefits of the consultation of each with every other; all must therefore meet together and consult, but then a majority may decide. In this case, however, though the law authorizes the trustees to apply to the supervisor and clerk, it furnishes no means of compelling their attendance, nor does it even in express terms declare it their duty to attend. It is only that one of them who accepts and acts under the application of the trustees who can be said to be appointed or vested with any power in the premises. Indeed, the doubt is rather whether the *sole* jurisdiction of the school commissioner is divested unless both the supervisor and clerk associate themselves with him. It is clear that they cannot act except in association with him. (*See Digest, ante, p.* 74.)

If neither attend, the commissioner may proceed to act alone; for he has the general power, and cannot be deprived of it by a fruitless application to the supervisor and clerk, where the latter decline or omit to be associated with him.

In the case of joint districts, the supervisors and town clerks of all the towns, parts of which are included in the district affected, have, under the practice recognized by the department, been associated with the town superintendents. In this case, the reasoning in favor of proceeding, notwithstanding the absence of some of the supervisors or

clerks, or even of both the supervisor and clerk of some of the towns, is stronger than in the case of a whole district.

Under the adjudications of the department it has been held that each town in such case had but one vote, so that the vote of a superintendent from one town counterbalanced the concurrent vote of the superintendent, supervisor and clerk from another town. As the school commissioner stands in the place of a town superintendent for *each* town within his jurisdiction, no town can be deemed to be unrepresented in consequence of the absence of its clerk and supervisor. The reasoning, however, which regarded the town officers as representatives of their respective towns is inapplicable since the substitution of the school commissioner for town superintendents, and each member of the board must be regarded under the existing law as having equal weight in the decision. In other words, it depends upon the majority of voices.

The practice under the section in question has always been difficult and obscure; and the recent changes in legislation render it so much more so that no opinion upon it can be expressed without qualifying with a doubt in respect to the ultimate decision. Further legislation is necessary if the section shall be allowed to stand as a part of the law. As an original question, it would admit of much doubt whether this section was in any case applicable to a joint district.

No. 75. Whenever it may become necessary or convenient to form a district out of two or more adjoining towns, the ["school commissioner in respect to the several towns within his jurisdiction"] of each of such adjoining towns, or the major part of them, may form, regulate and alter such district. (*Sec.* 44, *chap.* 480 *of* 1847, *modified in conformity to No.* 65, *ante.*)

The statute of 1819 made it the duty "of the commissioners aforesaid (of common schools), or the major part of them, from each of such adjoining towns, to form such district, and to alter and regulate the same." Under this statute it was very properly decided by Supt. Flagg, (*Common School Dec., p.* 23) that "no district can be formed or altered without the assent of two at least of the commissioners of the town in which the district is situated," and that "the law does not authorize the question to be settled by a joint ballot of the commissioners of two or more towns." This decision was followed, after the revision of 1830, apparently in consequence of overlooking the fact that the Revised Statutes changed the language of the section by substituting "the

commissioners of each of the adjoining towns, or the major part of them," which was held by Supt. Spencer, himself one of the revisors, to mean a major part of the board, instead of "the commissioners or the major part of them from *each* of such adjoining towns." When town superintendents were substituted for the town commissioners of common schools, it was held by those who followed the decision of Supt. Flagg that the assent of the superintendent of every town including any part of a joint district was necessary to its alteration. It is believed that the construction adopted by Supt. Spencer was the correct one, and that where the alteration of a joint district requires the action of a board composed of three or more school commissioners, unanimity is not required, but a majority may decide.

No. 76. No alteration of any school district, made without the consent of the trustees thereof, shall take effect until three months after notice, in writing, shall be given by the [school commissioner] to some one or more of such trustees; nor shall any alteration or regulation of an organized school district be made to take effect between the first day of December in any one year, and the first day of May following. (*Sec.* 45, *chap.* 480 *of* 1847, *modified in conformity to No.* 65.)

In the case of *Williams* v. *Larkin* (3 *Denio* 114), it was held by the supreme court, where an alteration of school districts made by the proper officers affected three districts, and the trustees of *two* of the districts consented to the alteration, but the trustees of the other district did not consent, that the alteration took effect immediately as to those districts whose trustees consented. In that case a part of District No. 14 was annexed to No. 3 with the consent of the trustees of both districts; the residue of No. 14 was annexed to No. 13 without the consent of the trustees of the latter. Judge Bronson, delivering the opinion of the court, says: "Although both alterations were made at the same time, they were not in their nature inseparable acts, and I see no reason why they might not take effect at different periods." It is obvious that alterations may be so connected and dependent upon each other as to render the principle of this case inapplicable. For example, so much of the order as *annulled* District No. 14 could not take effect until the expiration of three months, notwithstanding its trustees consented, because it was dependent upon the annexation of so much of said district as remained to No. 13. No. 14 was a district lying wholly within one town. According to the opinion of Supt. Spencer

(*Digest, ante, p.* 8), an order for the *dissolution* of a joint district might be valid, although the annexation of its parts to other districts might be void; and consequently its dissolution might take effect immediately, though the annexation of its parts to other districts might be suspended for three months.

While the alteration is inchoate it is wholly inoperative upon the rights of any person. Thus, where an order was made to annex territory to an existing district without the consent of the trustees of the latter, it was held that, before the expiration of the three months after notice, the same territory might be annexed to a third district without the consent of the trustees who had refused the annexation first proposed; but that the assent of the district from which it was taken by the first order was requisite. (*Common School Dec., p.* 65.) So, residents upon the territory to be transferred continue to be legal voters, and are entitled to notice of all district meetings held between the making of the order and the time it takes effect (*see Digest, ante, p.* 86), and must be assessed on any tax list made out in the mean time.

No. 77. If the [school commissioner having jurisdiction] in any town shall require, by notice in writing, the attendance of the [school commissioner] of any other town or towns, at a joint meeting for the purpose of altering a school district formed from their respective towns, and a major part of the [school commissioners] notified shall refuse or neglect to attend, the [school commissioners] attending, by a majority of votes, may call a special district meeting of such district, for the purpose of deciding on such proposed alteration; and the decision of such meeting shall be as valid as if made by the [school commissioners] of all the towns interested, but shall extend no further than to dissolve the district formed from such towns. (*Sec.* 46, *chap.* 480 *of* 1847, *modified in conformity to No.* 65.)

This section can become operative only in the rare case where three or more commissioners are requisite for the alteration, as it is only in such case that the *major part* can neglect to attend. The provision conveys a strong implication that, if a majority do attend, the board is competent to act as if all were present. If but one attends, and two or more absent themselves, it is to be inferred (though not without doubt) that he may call a district meeting.

The obscurity arises from the fact that the original section, enacted in 1822, and adopted in the revision of 1830, provided for the meeting of town boards, each composed of three commissioners; this was changed by simply substituting the words "town superintendents" for commissioners. As each superintendent succeeded to the authority of the board of commissioners of his town, it is fairly to be argued that he possessed, and that a school commissioner now possesses, the power of calling a meeting, notwithstanding the incongruity of the words carelessly left in the statute, "a majority of votes," with the action of a single person.

If the district meeting elects to dissolve the district (which is the extent of its power), the several parts revert to the towns in which they are respectively included, and become subject to regulation by the school commissioner having jurisdiction therein. (*See case of Newstead and Clarence, Digest, ante, p.* 8.)

No. 78. When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the districts of which it shall be composed; and when a district is annulled and portions thereof are annexed to other districts, the property of the district so annulled shall be sold by the [school commissioner] of the town in which the school-house is located, at public auction, to the highest bidder therefor, after at least five days' public notice by notices posted in three or more public places in said town, one of which shall be within the district so annulled, and the proceeds of such sale shall be first applied, so far as requisite, to the payment of any just debts due from the district so annulled, and the residue thereof shall be apportioned among the taxable inhabitants of the district so annulled, in the ratio of their several assessments upon the last corrected assessment roll of the town or towns withiu which such district is located. (*Sec.* 50, *chap.* 480 *of* 1847, *as amended by* § 2, *chap.* 382 *of* 1849, *and modified in conformity to No.* 65.)

When two districts are consolidated, the public money which either may have in the hands of the supervisor, unexpended, becomes applicable to the payment of teachers' wages and to the library of the consolidated district, without any distinction between the inhabitants or pupils of the former districts. If there is any money due to a teacher of either district, it should be drawn before the consolidation takes effect, or so

much of it as is applicable to the payment of wages during the term in which they were earned.

A district is annulled only when all its parts are annexed to other districts, so that nothing of the original district remains. If any of it remains as a distinct district, although designated by a new name and number, it is not a case of annulling.

In respect to the property to be sold: Property is defined in the Code of Procedure as including lands, tenements and hereditaments, money, goods, chattels, things in action and evidences of debt. The only point upon which much question is likely to arise regards the library of the annulled district. A portion of the books may have been purchased with money voted by the district and raised by tax upon the district. So far as these are concerned, they undoubtedly belong to the district and may be sold when it is annulled. In respect to those which have been purchased by the library money apportioned from the income of the United States deposit fund, the case is different. The money of the *state* was appropriated to *the support of common schools* by furnishing a library, and there is nothing to imply an intention that it should ever be diverted from its public purpose by becoming private property. The trustees of the district are made trustees of the library, but the *property* in it, it is declared, "shall be deemed to be vested in such trustees, *so as to enable them to maintain any action relative to the same.*" The legislature seem to have designed hereby to confer only a qualified property, for a specific purpose, retaining the general property in the people of the State of New-York, precisely as the property of the library of the court of appeals, the attorney general, &c., is held.

It is believed, therefore, that the books, so far as they have been purchased from the funds of the state, should be distributed precisely as the money itself would be if it came to the hands of the commissioner for distribution on the day of the annulling of the district; that is, should be assigned to the respective districts to which parts are annexed, in proportion to the number of children between four and twenty-one resident in such parts, according to the last report of the trustees.

It may happen in the case of a joint district that parts of it are within the jurisdiction of two school commissioners, and a school-house be situated in each of those parts. In such case, to avoid all question, both commissioners should unite in the sale of all the property and in executing the necessary bills of sale and deeds of the real estate.

The power to sell authorizes a sale only for ready money. The commissioner therefore should require cash payment, and should make and

proclaim it as a condition of the sale that unless full payment be made within a limited number of hours the property may be exposed without further notice, and that any loss upon such second sale shall be borne by the bidder not completing his purchase. This condition should be inserted in the posted notices.

No. 65, *ante*, imposes upon the commissioner the disposal and apportionment of the moneys arising from the sale, but proceeds: "and he shall pay over the said moneys to the *supervisors*, to be by them paid to the districts or parts of districts which may be entitled to receive the same." To satisfy the terms of the original section and the provisions above cited from No. 65, it would seem to be requisite that the commissioner should ascertain the just debts due from the district annulled, and make the apportionment of the residue of the proceeds of the sale among the taxable inhabitants, leaving the money in the hands of the supervisor for payment to the creditors and inhabitants of the district.

The debts must be ascertained from the trustees, and the supervisor should only pay them upon the written order of a majority of the trustees. If debts are claimed which are not admitted by the trustees, the money should be retained until any legal proceeding instituted for their collection is determined.

The last corrected assessment roll is that which was delivered by the assessors to the supervisor to be laid before the board of supervisors. If in the equalization by the board of supervisors the valuation of real estate has been changed, the roll as thus varied by them is to be followed in distributing the money. But the completion of a new roll by the assessors, and its delivery to the supervisor, supercedes the roll of the preceding year, although the latter has been and the former has not been passed upon by the board of supervisors. (7 *Wend.*, 89; *and see Digest, ante, p.* 104.)

In a joint district, where the proportion of taxes to be assessed upon the parts of such districts lying in different towns have been established by the supervisors of such towns, under sec. 72, chap. 480 of 1847, *post*, No. 129, the proceeds of the sale are to be divided between the parts of the districts in the proportion thus established, and the shares of such parts then apportioned to their respective inhabitants on the last corrected assessment roll of the town in which each part lies.

No. 79. When there shall be any moneys in the hands of the officers of a district that is or may be annulled, or belonging to such district, the [supervisor] of the town may demand,

sue for and recover the same, in his name of office, and [after deducting his costs and expenses shall report the balance in his hands to the commissioner, who] shall apportion the same equitably between the districts to which the several portions of such annulled district may have been annexed, to be held and enjoyed as district property. (*Sec.* 52, *chap.* 480 *of* 1847, *modified in conformity to No.* 53.)

The collector and trustees are the only officers of a district in whose hands there can be legitimately any money; such money may be the proceeds of a tax collected but not expended. In such case, the equitable mode of distribution would be to apportion it to the districts according to the amount which the taxable inhabitants and property set off to each have contributed thereto; the same rule would hold in regard to the proceeds of the sale of school-houses or other property acquired by taxation.

In case, however, the money is applicable to the payment of the current expenses of schools, such as the share of a town fund, the income of a school lot or the districts' proportion of fines for gambling, under chap. 504 of 1851, the equitable rule of apportionment is to assign it to the districts in proportion to the number of pupils resident in the parts annexed to them respectively.

In case it becomes necessary to bring an action against the officers of a joint district, the supervisors of all the towns of which it forms a part must join as plaintiffs in the suit.

It may be doubted whether the supervisor is authorized to maintain an action against any other person than an officer of a district for moneys belonging to it; the statute, giving him the power to sue, confining it to penalties and forfeitures, and to defaults and omissions by town and district officers; the trustees should in such case bring the action before the order annulling their district takes effect.

No. 80. Whenever a school district shall be dissolved, by consolidation or otherwise, it shall be the duty of the trustees of such district to make out all the necessary rate bills and tax lists, and issue their warrants according to law for the collection of all such sums of money as shall be necessary to discharge all legal liabilities of such district so dissolved or consolidated, and to call special meetings of the legal voters of such district, if it be necessary to raise money by tax, to discharge such demands; and the collector to whom any such

rate bill or tax list and warrant shall be delivered for collection, shall have power to execute the same in the same manner and with like authority as though such district had not been dissolved or consolidated. (*Sec.* 53, *chap.* 480 *of* 1847.)

Though the statute contains no limitation of the time within which the trustees of a dissolved or consolidated district are required to discharge their duties under this section, there can be no valid reason for any longer delay than may be essential to ascertain its outstanding liabilities. The pendency of litigation, in respect to some of them, may put it out of the power of the trustees to act immediately, and their powers doubtless continue so long as any legal liability subsists; the existence of the district is maintained for this special purpose, and its last officers hold over until it is accomplished. In case of the removal, death or other inability of the clerk or collector, it is probably within the power of the trustees to fill the vacancy by appointment. The difficulties which may arise in filling such vacancies, and the impossibility of supplying a vacancy among the trustees, must admonish the latter of the serious importance to themselves of settling the affairs of the district with the greatest possible dispatch.

OF THE POWERS OF SCHOOL DISTRICT INHABITANTS, AND OF THE CHOICE, DUTIES AND POWERS OF SCHOOL DISTRICT OFFICERS.

No. 81. Whenever any school district shall be formed in any town, it shall be the duty of the ["school commissioner, in respect to the several towns within his jurisdiction,"] within twenty days thereafter, to prepare a notice, in writing, describing such district, and appointing a time and place for the first district meeting, and to deliver such notice to a taxable inhabitant of the district. (*Sec.* 54, *chap.* 480 *of* 1847, *modified in conformity to No.* 65.)

Where two or more districts are consolidated, the united territory forms a *new* district. It is necessary to elect new trustees and other district officers, and the notice provided by this section should, therefore, be given by the commissioner. The meeting for organization cannot be held until the district "shall be formed," that is, not until the order for its formation shall have taken effect by the consent of trustees, the

expiration of three months' notice or the decision of an appeal, if one has been brought.

The notice is to describe the district by metes and bounds, so that the inhabitant to whom it is delivered may know, without recourse to any other document, over what territory he is to search for inhabitants. It may be in the following form:

To , a taxable inhabitant of District No. , in the town of :

Whereas, By an order of the school commissioner for the assembly district (or *section*, where a county forming but one assembly district is divided) of the county of , which order is dated the day of , and took effect on that day (or will take effect on the day of next, specifying the day, which must precede the day of meeting), a school district is formed, numbered No. , and bounded and described as follows, viz: Begining (pursuing the description as in the note to No. 73.)

You are hereby required to notify every male person of full age, residing in the territory above described and entitled to hold lands within this state, who owns or hires real property subject to taxation for school purposes, and every resident of such territory authorized to vote at town meetings of the town of , (in the case of a joint district, say, either of the towns of or) and who has paid any rate bill for teachers' wages in such territory within one year preceding the day of (the date of the *meeting*, not of the notice), or who owns any personal property, liable to be taxed for school purposes in such territory, exceeding fifty dollars in value exclusive of such as is exempt from execution, that the first district meeting of said district is hereby appointed to be held at the house of , at six o'clock in the afternoon of the day of next, for the purpose of electing a district clerk, three trustees, a district collector and a librarian; of designating sites for two or more school-houses, to which I hereby consent; and of voting such taxes to purchase or lease such sites, to hire, build or purchase such school-houses, to keep in repair and furnish the same with necessary fuel and appendages, for the purchase of a book for the purpose of recording the proceedings in the district, and, in their discretion, an additional tax, not exceeding twenty dollars, to purchase maps, globes, black-boards and other school apparatus; to adjourn from time to time as occasion may require, and at such meeting or any adjourned session thereof to transact such other business as the inhabitants then assembled shall deem expedient.

You are required by law to read this notice in the hearing of each inhabitant qualified as above described, or, in case of his absence from home, to leave a copy of so much thereof as relates to the time and place of such meeting at the place of his abode, at least six days before the time of the meeting. Dated this day of .

A. B.,
School Commissioner.

It is not claimed to be absolutely essential that the notice should be as full as the form above recommended. It is essential that the time of day and the place of meeting should be accurately specified. (16 *Verm. R.*, 444.) It is eminently desirable that the notice should be so broad that no person hearing it should have the slightest ground for professing to be surprised at any business which can by possibility be presented at the meeting. This is a rule that is applicable to all notices for all meetings. At the same time, it is expedient that the earliest occasion should be taken to apprise the inhabitants of the extent of the powers of a district meeting, and how little they are limited by the terms of the notice. A meeting lawfully assembled for one object is competent to act upon others which were not in the contemplation of those who procured it to be called, and may do almost anything except change the site of the school-house. It is true that, though the proceedings of a meeting may be entirely regular and legal, it is within the equitable powers of the State Superintendent, upon an appeal, to set them aside where it can be shown that there was a fraudulent design to frame the notice in such a manner as to conceal the real purpose for which the meeting was convened. But it is not to be forgotten that the object of the notice is merely to assemble the inhabitants as the local legislature, and that when so assembled their powers are defined, not by the notice but by the statute. Indeed it would follow, from the general principles which have been applied by the courts to elections and other corporate acts, that "if *all* were present, though *by accident* and *without notice*, their acts would be good." (*King* v. *Theoderic*, 8 *East.*, 543; *see also* 11 *Wend.*, 604.) In reference to an *annual* meeting, the supreme court (6 *Hill*, 647) say: "for greater caution, and to give greater publicity to the meeting, the statute directs the clerk to post notice of it; but that is not essential to its validity. The time and place for holding it may always be ascertained by examining the clerk's records, and an objection that notice was not duly posted should never be allowed to prevail. The foundation of the meeting is the order of a previous annual meet-

ing, not the posting of a notice by the clerk. The former is indispensible, but not the latter." (*See pp.* 63, *and* 74, *ante.*)

No. 82. It shall be the duty of such inhabitant to notify every other inhabitant of the district, qualified to vote at district meetings, by reading the notice in the hearing of such inhabitant, or, in case of his absence from home, by leaving a copy thereof, or of so much thereof as relates to the time and place of such meeting, at the place of his abode, at least six days before the time of the meeting. (*Sec.* 55, *chap.* 480 *of* 1847.)

In computing statute time, the first day, or the day on which the time begins to run, is to be excluded. (10 *Barb.*, 117.) The notice under this section, must be six full days, exclusive of the day of service, and must therefore be given as early as the seventh day before the meeting.

It is always important that the persons on whom and the manner in which the notice has been served should be verified by proper evidence, which can be preserved. In reference to a similar notice under the school law of Massachusetts, the supreme court of that state says: "When the selectmen direct a warrant for calling a school district meeting to a proper person, he is made a returning officer for that occasion. All returning officers are ministerial, and are bound to set forth in their returns all the acts done by them, that the proper tribunal may judge of their sufficiency. They are not competent to judge of the legality of a notice or service; and a return that a precept had been *legally* served, or that the duty enjoined by a warrant had been *duly* performed, would most clearly be insufficient." To obviate this objection the inhabitant who gives notice of the meeting should frame his return in substantially the following manner:

Pursuant to the within notice, I have notified the inhabitants qualified and residing as therein described, at least six days before the time of the meeting, in the following manner, viz: By reading the notice in their hearing—John Doe, Charles Davis, &c. (naming them in full); by leaving a copy of so much of the within as relates to the time and place of meeting at their respective places of abode, they being absent from home—Robert Kidd, Henry Hunter, &c., &c. This return, endorsed upon the notice and signed by the inhabitant making it, should be produced at the meeting and filed with the records of the district. It constitutes the appropriate evidence of the service of notice; but it is not to be inferred that in its absence secondary evidence may not be

received to support the proceedings of the meeting, whose jurisdiction depends upon *facts* and not upon mere evidence.

It is proper to remark that the notice should be given to every inhabitant having any pretension to a right to vote, although the person giving it may deem his qualifications insufficient. The giving him notice determines nothing as to the right; the omission of it may invalidate the proceedings and subject the voters to the inconvenience of a second meeting.

No. 83. In case such notice shall not be given, or the inhabitants of a district shall refuse or neglect to assemble or form a district meeting, when so notified; or in case any such district, having been formed and organized in pursuance of such notice, shall afterwards be dissolved, so that no competent authority shall exist therein to call a special district meeting in the manner hereinafter provided; such notice shall be renewed by the [school commissioner] and served in the manner above prescribed. (*Sec.* 56, *chap.* 480 *of* 1847, *modified in conformity to No.* 65.)

No comment is necessary upon so much of this section as relates to the repetition of the notice of the first meeting for the organization of a district. The power of the commissioner to call a meeting in a district after it has been organized by the election of officers is restricted, so far as this section goes, to the case of no competent authority existing therein in consequence of its having been *dissolved.* It is intended to provide only for the case of a joint or consolidated district being severed. A subsequent section confers the power of calling meetings upon the commissioner in the cases therein mentioned.

No. 84. Every taxable inhabitant, to whom a notice of a district meeting shall have been properly delivered for service, who shall refuse or neglect to serve the notice in the manner above in this article enjoined, shall for every such offence forfeit the sum of five dollars. (*Sec.* 57, *chap.* 480 *of* 1847.)

It will be observed that this section imposes a penalty for every refusal to serve a notice for *any* district meeting properly delivered to an inhabitant. It is coextensive with the preceding section. A doubt whether the commissioner is legally entitled to his office will not excuse a refusal, if he be an officer *de facto*, holding under color of election and exercising the duties of the office. It is not for a ministerial officer

to judge of the validity of the election of an officer *de facto;* for example, a district clerk should serve a notice signed by persons recognized and acting as trustees, though he deems them to have no title to the office and regards the notice as invalid. (*See* 7 *John.*, 552; *Digest, ante, pp.* 55 *and* 61.)

No. 85. Every notice of a district meeting called in pursuance of this act shall state the purpose for which such meeting is called. (*Sec.* 64, *chap.* 480 *of* 1847.)

It is of great importance to the peace and harmony of districts that no inhabitant should have the slightest foundation for alleging himself to have been misled as to the object for which a district meeting is called. The statute therefore enjoins a distinct declaration of the purposes of those who procure the call of a meeting in the notice for it. It is a violation of official duty on the part of the trustees to omit the mention of any subject which it is intended to submit to the consideration of the inhabitants. For their own protection, and for the purpose of rendering the proceedings safe against objection, they should seek to err by unnecessary fullness and particularity in the enumeration of the purposes of a meeting rather than by an omission which they may deem of no importance. It is true, indeed, that every inhabitant who absents himself from *any* meeting, voluntarily assumes the risk that those who assemble may act upon various subjects not mentioned in the notices, and bind the absentees by their determination, but this furnishes no excuse for the officers whose duty it is to give him the amplest warning in their power.

No. 86. In each school district an annual meeting shall be held at the time and place previously appointed; and at the first district meeting, and at each annual meeting, the time and place of holding the next annual meeting shall be fixed. (*Sec.* 65, *chap.* 480 *of* 1847.)

It has been recommended by the State Superintendent that the first Tuesday of October should be fixed by law as a general time for holding the annual meetings. The fiscal year of the state closes with the 30th of September, and it is very desirable that the annual accounts of the districts should be brought up to the same time. Many districts have voluntarily conformed to this suggestion, and it is in the power of all to do so by adjourning their annual meeting to that day. (*See Digest, ante, p.* 3.) It is necessary, however, as the law now stands, that

the resolution fixing the time and place for the next, should be repeated at each, annual meeting.

No. 87. Whenever the time for holding annual meetings in a district for the election of district officers shall pass without such election being held, a special meeting shall be notified by the clerk of such district to choose such officers; and if no such notice be given by him or the trustees last elected or appointed within twenty days after such time shall have passed, the [*town superintendent*] or town clerk may order any inhabitant of such district, qualified to vote at district meetings, to notify such meeting in the manner provided by law in case of the formation of a new district; and the officers chosen at any such special meeting shall hold their office until the time for holding the next annual meeting. (*Sec.* 66, *chap.* 480 *of* 1847.)

The statute has not substituted the school commissioner or supervisor in place of the town superintendent for the purposes of this section. It is intended to provide for the case where an annual meeting has fallen through (at least so far as the election of officers is concerned), the time of which was regularly fixed by the preceding annual meeting, or in default of that by the trustees. In that case the clerk and other officers hold over until superseded by a new election, and cannot be superseded by an *appointment*. It is the duty of the trustees in the first instance to order a meeting for that purpose, and for the clerk to give the notice. If the trustees fail to order a meeting, the clerk should himself appoint a time and give the notice, and this he should do notwithstanding the expiration of twenty days (the statute in regard to the time being merely directory), unless the town clerk shall have acted in the premises. The town clerk should promptly make the order, upon the application of any inhabitant, at the expiration of twenty days, without waiting for the action of the trustees or district clerk.

No. 88. When the clerk and all the trustees of a school district shall have removed or otherwise vacated their office, and where the records of a district shall have been destroyed or lost, or where trustees neglect or refuse to call meetings to choose trustees, the superintendent shall have authority to order such meetings, and the same shall be notified in the

manner provided by law in the case of the formation of new districts. (*Sec.* 67, *chap.* 480 *of* 1847.)

This section is substantially a transcript of § 4, chap. 330 of 1839, and the superintendent meant by it is the State Superintendent.

An inhabitant who neglects to serve a notice under either of the two preceding sections is liable to a penalty of five dollars under *No.* 84, *ante.*

No. 89. When in consequence of the loss of the records of a school district, or the omission to designate the day for its annual meeting, there shall be none fixed, or it cannot be ascertained, the trustees of such district may appoint a day for holding the annual meeting of such district. (*Sec.* 68, *chap.* 480 *of* 1847.)

The direction of the trustees to the clerk to give notice of an annual meeting for a particular day is an appointment of that day. (*Digest, ante, p.* 103.) It ought to be in writing, subscribed by a majority of the trustees, and should recite the fact that no day was designated at the last annual meeting, or that the same cannot be ascertained. In case the records state that a day was designated, but the fact is disputed, the trustees should obviate the objection by formally appointing the day mentioned in the records, sufficient time in advance to enable the clerk to post a notice of at least five days.

No. 90. A special meeting shall be held in each district whenever called by the trustees; and the proceedings of no district meeting, annual or special, shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give such notice was willful and fraudulent. (*Sec.* 69, *chap.* 480 *of* 1847.)

The provision to cure the defect of notice relates to the mode and extent of service, and not to the insufficiency of the matter contained in the notice itself.

It was intended for cases where through accident or mistake the proper legal notice has not been given to all who are entitled to it; but it cannot be construed to extend to cases in which *no attempt* is made to give the notice required by law to *any* of the inhabitants. Where the clerk of a district undertakes to give a notice in the manner provided by the statute, and has failed, unintentionally, to serve such notice

on all the persons entitled to receive it, or where such notice is imperfectly served, the proceedings of the meeting will not be *void* on that account. They may, however, be *set aside* on appeal, on showing sufficient cause. (*Com. School Dec.*, 186, 223; *and also Digest, ante, p.* 86.)

No. 91. Whenever any district meeting shall be called in the manner prescribed in the preceding sections of this article, it shall be the duty of the inhabitants of the district, qualified to vote at district meetings, to assemble together at the time and place mentioned in the notice. (*Sec.* 58, *chap.* 480 *of* 1847.)

The question of residence is one frequently agitated, not only with respect to the right of voting and of holding district offices, but in regard to the enumeration of pupils. The principles which govern its determination have been largely discussed by the courts in construing the words *residence, domicil* and *inhabitancy*, which, though not in all respects and for all purposes convertible terms, mean generally the same thing.

Inhabitancy and residence, says Chancellor Walworth (8 *Wend.*, 140), "mean a fixed and permanent abode or dwelling place for the time being, as distinguished from a *mere temporary locality* of existence." To acquire a domicil two things are necessary, the *fact* of residence in a place, and the intent to make it a home. To *retain* a domicil once acquired, actual residence however is not indispensable, but it is retained by the mere intention not to change it or adopt another, or rather by the absence of any present intention of removing therefrom. Nor is the domicil affected by the forming of an intention to remove, unless such intention is carried into effect. This results from the rule that a domicil once acquired remains until a new one is acquired. In legal contemplation, every person must have a domicil somewhere, and he can only have one domicil at one and the same time.

In determining the locality of a man's existence, where he divides his hours between different buildings, the place of his dwelling-house is first regarded in contradistinction to any place of business, trade or occupation. If he has more than one dwelling-house, that in which he sleeps or passes his nights, if it can be distinguished, will govern. If the dwelling-house is partly in one town and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained (23 *Pick.*, 178.)

The constitution establishes the rule, by § 3, *art.*, 2, that "For the purpose of voting, no person shall be deemed to have gained or lost a

residence by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any alms-house or other asylum at public expense; nor while confined in any public prison."

The intention of remaining, requisite to constitute a resident, must be independent of any temporary purpose of business, health or pleasure, though it does not necessarily exclude the idea of removing after an indefinite time, or a change of circumstances. Once established in any place, the presumption of residence continues unless rebutted, and the burthen of proof is upon a party alleging a change.

The following is a condensed statement of the rules given by Judge Story (*Conflict of Laws, chap.* 3); most of them are stated and illustrated by our supreme court (4 *Barb.*, 518):

1. The place of birth of a person is considered as his domicil, if it be at the the time the domicil of his parents. This is called the domicil of nativity. But if his parents are on a visit or on a journey, the home of the parents will be deemed his domicil. An illegitimate child follows the domicil of his mother;

2. The domicil of birth continues until he has acquired a new domicil;

3. A minor is generally deemed incapable of changing his domicil, but if the parent changes his domicil that of the minor follows it. If the father dies his last domicil continues that of his minor children. This rule is subject to qualification if the minor has been emancipated from parental control or adopted into a new family;

4. A married woman follows the domicil of her husband;

5. A widow retains the domicil of her deceased husband until she acquires another;

6. Prima facie, the place where a person lives is deemed his domicil;

7. Every person of full age having a right to change his domicil, if he *removes* to another place with an *intention of making it his permanent residence*, that immediately becomes his domicil;

8. If a person removes to another place with an intention of remaining there for an indefinite time, and as a place of present domicil, it becomes his domicil notwithstanding he may entertain a floating intention to return at some future period;

9. The place where a married man's family resides is generally deemed his domicil, but not if it be a merely temporary establishment;

10. If a married man has his family in one place and his business in another, the former is deemed his domicil;

11. If a married man has two places of residence at different times of the year, that will be esteemed his domicil which he himself selects

or deems his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen;

12. If a man is unmarried, that is generally deemed his domicil where he transacts his business, exercises his profession or assumes the privileges or duties of a citizen. But this rule is subject to qualification;

13. Residence, to produce a change of domicil, must be voluntary, not by imprisonment, &c.;

14. Mere intention to remove, without the fact of removal, will not change the domicil; nor will the fact of removal without intention. They must go together;

15. A domicil, once acquired, remains until a new one is acquired.

No. 92. Every male person of full age, residing in any school district and entitled to hold lands in this state, who owns or hires real property in such district subject to taxation for school purposes, and every resident of such district authorized to vote at town meetings of the town in which such district or part of district is situated, and who has paid any rate bill for teachers' wages in such district within one year preceding, or who owns any personal property liable to be taxed for school purposes in such districts exceeding $50 in value, exclusive of such as is exempt from execution, and no others, shall be entitled to vote at any school district meeting held in such district. (*Sec.* 59, *chap.* 480 *of* 1847.)

Cases elucidating the qualifications of voters will be found at pages 67, 81 and 90, *ante*. They must in all cases be males, twenty-one years of age, and residents of the district. Possessing these qualifications, a man to be entitled to vote must possess also one of the following qualifications, and *either* one is sufficient:

1. He must be entitled to hold lands, and therefore, if an alien, must have complied with the condition stated at page 81, and must also own or hire real property in the district subject to taxation; it matters not how small is the real property or how brief the term for which it is hired; tenancy from week to week of a shanty or a room is sufficient. The real property must be subject to taxation, and it matters not that the person claiming to vote as the owner or hirer of it is not actually taxed for it himself, or that the property is not taxed to the owner or any other person. A man of color may, therefore, be a voter at a district meeting, who *hires* real property of less than $250 in value, because it is subject to taxation as the property of the *owner;* although the man of color cannot vote as the owner of real property of less than $250 in

value, because the constitution (§ 1, *art.* 2) exempts him from taxation unless he possesses a freehold estate of that value. *Quere*, however, whether a man of color who *owns* real property, worth say $200, which he rents to a white man, so that the latter is taxable as occupant, is not entitled to vote at a district meeting.

2. *Or* must own personal property liable to taxation exceeding $50 in value, exclusive of such as is exempt, and must be authorized to vote at town meetings of the town in which the district, or the part thereof where he resides, is situated.

In *Crawford* v. *Wilson*, 4 *Hill*, 504, the supreme court held in effect that in estimating the amount of a voter's personal property a debt due to him from a school district for teachers' wages, and from his father for services, might be taken into account. No unnaturalized alien, Indian or man of color can entitle himself to vote in virtue of his possession of taxable personal property. His claim must be tested by the possession of the right to vote at town meeting, which requires citizenship (which excludes aliens and Indians) for ten days, residence of the state for one year next preceding, and of the county for the last four months, and, in regard to the man of color who is a citizen, the real property qualification also.

3. *Or* he must be entitled to vote at town meetings, and must have paid a rate bill for teachers' wages within one year preceding. In 4 *Hill*, 516, above cited, it was held that the payment by the voter of part of a rate bill for teachers' wages, although included in the sum assessed against his father, comes within the terms of the act.

This qualification, like the preceding, is inapplicable to unnaturalized aliens, Indians and men of color.

The personal property exempt from execution is defined by law as follows: "When owned by any person being a householder; and such articles thereof as are movable shall continue so exempt while the family of such person or any of them may be removing from one place of residence to another.

"1. All spinning wheels, weaving looms, and stoves put up or kept for use in any dwelling-house;

"2. The family bible, family pictures, and school books used by or in the family of such person; and books not exceeding in value fifty dollars, which are kept and used as part of the family library;

"3. A seat or pew occupied by such person or his family in any house or place of public worship;

"4. All sheep to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same (though not the owner of the sheep

on which grew the fleeces from which they are made, 21 *Wend.*, 69), one cow, two swine, the necessary food for them (but not for a team, 5 *Denio*, 119), all necessary pork, beef, fish, flour and vegetables actually provided for family use (although such vegetables may be in the ground, undug or not fully grown, 25 *Wend.*, 370), and necessary fuel for the use of the family for sixty days;

"5. All necessary wearing apparel, beds, bedsteads and bedding for such person and his family, arms and accoutrements required by law to be kept by such person, necessary cooking utensils, one table, six chairs, six knives and forks, six plates, six teacups and saucers, one sugar dish, one milk pot, one tea pot and six spoons, one crane and its appendages, one pair of and-irons and a shovel and tongs;

"6. The tools and implements of any mechanic necessary to the carrying on of his trade, not exceeding twenty-five dollars in value." (*Sec.* 22, *chap.* 6, *art.* 2, *tit.* 5, *part* 3, *Rev. Stat.*)

It is also provided, by chap. 157 of 1842, that in addition to the articles before enumerated, there shall be exempted from levy and sale under execution "necessary household furniture, and working tools, and team owned by any person being a householder or having a family for which he provides, to the value of not exceeding $150; provided that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture, or tools, or team or articles now enumerated by law."*

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* "No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine in pursuance of any statute of this state." (2 *R. S.*, *p.* 522, § 4.)

This provision must, however, be subject to the action of congress on a subject which by the constitution is within its jurisdiction. The constitution in express terms gives to congress the power "to provide for organizing, arming and disciplining the militia."

By the act of congress of May 8, 1792 (*vol.* 2, *Laws of the United States*, 293), every citizen enrolled in the militia is required to provide himself with the following accoutrements, viz: "A good musket or firelock, a sufficient bayonet and belt, two spare flints and a knapsack, a pouch with a box therein, to contain not less than twenty-four cartridges suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot pouch and powder horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder;" and the commissioned officers are required to be armed with a sword, or hanger, or espontoon; and it is declared that every citizen so enrolled and providing himself with arms, ammunition and accourtrements, required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales for debts, or for the payment of taxes.

By the laws of this state (*chap.* 6, *part* 3, *title* 5, § 22, *vol.* 2, *R. S.*), the "arms and accoutrements required by law to be kept by any person," as well as a variety of other articles therein specified, are exempt from execution, but not from distress from taxes. The only exemption, therefore, from the operation of a collector's warrant on a tax list, arises under the act of congress before quoted, and this can only be extended to the arms, ammunition and accoutrements therein specified.

No. 93. If any person offering to vote at any school district meeting shall be challenged as unqualified, by any legal voter in such district, the chairman presiding at such meeting shall require the person so offering to make the following declaration: "I do declare and affirm that I am an actual resident of this school district, and that I am qualified to vote at this meeting." And every person making such declaration shall be permitted to vote on all questions proposed at such meeting, but if any person shall refuse to make such declaration his vote shall be rejected. (*Sec.* 60, *chap.* 480 *of* 1847.)

(*See Digest, p.* 61, *ante.*) A party knowing a person to be unqualified and permitting him to vote without challenge will not be allowed to object to the proceedings of the meeting because such unqualified person participated in them. It has been the practice of some of the State Superintendents upon appeal to disregard the objection that unqualified persons voted, unless they were challenged, although it did not appear that the fact of their disqualification was known at the time of the meeting. The rule is well settled, that proceedings will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. (*See Digest, ante, p.* 99.) It lies upon the party objecting to show that fact, even, according to the judgment of the supreme court, in 7 *Cowen*, 153, if the nature of the proceeding is such as to deprive him of the power, as in the case of a vote by ballot. In the case cited the court say: "For aught that appears, the spurious ballots were for the ticket which was in the minority. To warrant setting aside the election, it must appear affirmatively that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority." It is also incumbent upon the appellant to state the facts showing the lack of qualification in such terms as to necessarily exclude every presumption that the voter could be qualified under either of the three heads stated in the note to the previous section. (*See Digest, ante, p.* 90.)

A challenge should be interposed at the very first instance in which an unqualified person may offer to vote; for it would be very unjust to permit a party to avail himself of a vote so long as it should be cast in accordance with his views, and then to object when a difference manifested itself between himself and the voter.

If a challenge is interposed upon the vote for chairman, the person who made the nomination ordinarily takes the question upon it, and should regard himself as temporary chairman, and require the declaration

prescribed by the statute from the challenged party, which should be given in the very words of the law.

No. 94. Every person who shall willfully make a false declaration of his right to vote at a district meeting, upon being challenged as hereinbefore provided, shall be deemed guilty of a misdemeanor, and punished by imprisonment in the county jail for a term not exceeding one year nor less than six months, at the discretion of the court; and any person voting at any school district meeting without being qualified, shall, on conviction, be subject to a fine of ten dollars, to be sued for and recovered by the trustees of the district for its use, and with costs of suit, before any justice of the peace. (*Sec.* 61, *chap.* 480 *of* 1847.)

No. 95. The inhabitants so entitled to vote, when so assembled in such district meeting, or when lawfully assembled at any other district meeting, shall have power, by a majority of the votes of those present:

1. To appoint a chairman for the time being;
2. To adjourn from time to time, as occasion may require;
3. To choose a district clerk, three trustees, a district collector and a librarian at their first meeting, and as often as such offices or either of them become vacated;
4. To designate a site for a district school-house;
5. To lay such tax on the taxable inhabitants of the district as the meeting shall deem sufficient to purchase or lease a suitable site for a school-house, and to build, hire or purchase such school-house, and to keep in repair and furnish the same with the necessary fuel and appendages;
6. To alter, repeal and modify their proceedings from time to time, as occasion may require;
7. To vote a tax for the purchase of a book for the purpose of recording the proceedings in their respective districts;
8. With the consent of the [school commissioner] of the town, to designate sites for two or more school-houses for such district, and lay a tax on the taxable property in such district to purchase or lease such sites, and to hire, build or purchase such school-houses, and to keep in repair and furnish the same with necessary fuel and appendages, and may also in their discretion lay a tax, not exceeding twenty dollars in any one year, to purchase maps, globes, black-boards and other school apparatus. (*Sec.* 62, *chap.* 480 *of* 1847.)

In the exposition of this very important section, each of the powers conferred by it will be separately treated. It is to be observed, that the section grants these powers to the inhabitants entitled to vote, when lawfully assembled at their first district meeting, or at *any* other district meeting. It is impossible in the face of these explicit words to confine the exercise of these powers to an *annual* meeting, or to limit them to the objects expressed in the notice under which the meeting is called. (*See Digest, ante, pp.* 15, 98, 104.) This does not conflict with the doctrine that it is the duty of trustees, when giving notice of every meeting, to state the purpose for which it is called. They are bound to inform the inhabitants what business *they*, or those at whose instance they give the notice, propose to lay before the meeting. But their neglect in this particular cannot deprive the inhabitants of any power which the statute confers upon them. The inhabitants are the legislative power, and, when lawfully assembled, are entitled to consider and act upon propositions affecting the interests of the district, by whomsoever offered and with however little premeditation, unless where specially restrained, as they are in respect to a change of site.

The resolutions of the meeting are determined by a majority of the votes of those present and voting, and do not require the votes of a majority of all present *and not voting*. Even if the words of the statute were less explicit this would be the rule at common law, which, as stated by Lord Mansfield (2 *Burr.*, 1021), is: "Whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do." In that case twenty-one electors were present, nine of whom voted for *S.* as town clerk, eleven protested against him without voting for any one else, and one other said "he suspended doing anything." The action of the twelve was held to be the same as if they had been silent; and being present, but silent, exactly as if they had been absent. They must be taken to assent to what the others agree to in carrying out the purpose of the meeting.

The same doctrine is applied in a recent case (7 *Adolph. & Ellis*, 454) to other resolutions than those for an election. The court say: "The principle, indeed, may be best illustrated by the analogy drawn from electoral meetings; but it is, in truth, of a very general nature, and inseparable from the proceedings of any assembly convened for doing some act necessary to be done at that meeting. The majority must do it; otherwise, however necessary, it will be left undone. But what majority? The majority of those who choose to take a part in the proceedings of the assembly. At almost every meeting of commis-

sioners for executing public works and imposing rates for that purpose, it is probable that the resolution is formed by a small number of those who attend, on whom the larger number are content to rely. If it were found as a fact that five had passed the resolution in a room containing twenty, of whose proceedings the other fifteen were ignorant, this would be the undoubted act of the whole meeting, if the proceedings had been conducted regularly and no fraud were practiced to occasion the ignorance of the fifteen. But suppose the twenty were convened to do an act which the law required them to do at that time, and the only open question was as to the *mode* of doing it; a mode lawful in itself is regularly submitted, whereupon fifteen declare that though the law has imposed the duty on them they entertain so strong an objection, on grounds of conscience, to the law, that they refuse entirely to concur in obeying it. What must be the consequence? Must the law be set at nought and its requirements be disregarded, or must not those who stand aloof be considered as refusing to assist in the execution of their duty and leaving it to be done by the minority, which is desirous of doing what is right?"

We proceed to consider the several powers of a district meeting in the order of the statute.

1. To appoint a chairman for the time being: As the statute directs the appointment of a *chairman*, he should be so entitled, and not moderator or president. The acceptance of the position does not deprive the chairman of the right to vote upon any question submitted to the meeting. (*See Digest, ante, p.* 68.) He may either give a casting vote upon a tie, or, when there is a majority of one in favor of any resolution, may vote with the minority, and thus make a tie vote, which defeats the resolution; or without waiting for this result may, upon the call of yeas and nays by the clerk, vote when his name is reached. He can, however, cast but one vote upon the question.

It is the chairman's duty to put every question to vote which is made and seconded. (*Ante, p.* 42.) If he deems the motion out of order, he should so declare; if the party making the motion deems his decision upon the point of order erroneous, it his right to appeal to the meeting from such decision, and, if the appeal is seconded, it is the duty of the chairman to put the question: "Shall the decision of the chair be sustained?" If upon such appeal the meeting vote against the decision of the chair, it is the chairman's duty to put the original question; a refusal to do so is disorderly, and it is in such case in the power of the meeting to select a new chairman who will conform to its decision. The

motion for this purpose may, from the necessity of the case, be put by the clerk. There being no code of rules to regulate the proceedings of district meetings, that must be held to be in order to which a majority consents. The office of the chairman is to facilitate the ascertaining of the wishes of the majority. If their determination be illegal, the remedy is by appeal.

2. To adjourn from time to time, as occasion may require: A motion for adjournment takes precedence of all others, for otherwise the meeting might be kept in session against its will, and for an indefinite period. A majority who were desirous of adjourning could not withdraw without leaving all the powers of the meeting in the possession of the minority. (*See Digest, ante, p.* 20.) And if any other motion were permitted to take precedence, it might be in the power of a factious minority, by renewing such motions, to wear out the physical endurance of the majority. This motion, however, cannot be received after another question is actually put, and while the meeting is engaged in voting upon it; but in such case the vote must be concluded and the result announced by the chairman. If a question be put for adjournment, it is no adjournment until the chairman pronounces it.

An adjournment is either without day or to a specified time. In the former case all propositions upon which the question has not been taken are discontinued, and are not taken up at another meeting except upon a fresh proposition. In the latter case it is but a continuance of the session; all matters depending remain in the same situation in which they were left, and when the meeting again convenes are resumed at the precise point at which they were left. The statute, however, regards an adjournment for more than one month as constituting a new meeting, so far as to require the posting of written notices of the time and place thereof in *four* at least of the most public places of the district, at least five days before the time appointed. If a special meeting be properly called, or the annual meeting occur in the mean time, its powers in reference to any subject are not impaired by the fact that a previous meeting, having such subject under consideration, stands adjourned to a subsequent day. (*See Digest, ante, pp.* 83, 98, *and* 6 *Metcalf, Mass. Rep.*, 509.)

3. To choose a district clerk, three trustees, a district collector, and a librarian, at their first meeting, and as often as such offices or either of them become vacated: The office of clerk, collector or librarian is incompatible with that of trustee. (*See Digest, ante, p.* 7.) The statute (*sec.* 6, *chap.* 480 *of* 1847) provides that "no town superintendent of a town shall hold the office of trustee of a school district, nor shall a per-

son chosen a trustee hold the office of district clerk, and no town superintendent shall hold the office of either supervisor or town clerk."

As all the duties which rendered the office of town superintendent inconsistent with that of trustee are now devolved upon the school commissioner, the latter, under the policy of the law, is inelegible to the office of trustee. In reference to votes cast for disqualified candidates, the law is thus stated in 7 *Adolph & Ellis* 437: "The result of the decisions appears to be this: Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may he void, or voidable, or in the latter case may be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal in order to be made available, or it may be such as to place the elected candidate on the same footing as if he had never existed and the votes for him were a nullity; but in no case are the electors who vote for him deprived of their votes. If the fact becomes known and is declared while the election is still incomplete, they may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterwards, the party elected may be ousted, and the election declared void (by a competent tribunal); but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector before voting receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it can be resisted, that is, help to elect some other person. * * * If he dissents from the choice of A., who is qualified, he must say so by voting for some other, also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. * * * Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice, for without that the inference of assent could not fairly be drawn, nor could the consequences as to the vote be just; but if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given. No one can doubt that if an elector would nominate and vote only for a woman, his vote would be thrown away. The fact would then be notorious, and every man would be presumed to know the law upon that fact."

A person who is present at the meeting, when elected to any office, will be deemed to accept the same unless he declares his refusal, so that if the meeting chooses to excuse him a new election may be had. Any votes given for him for an incompatible office subsequent to such acceptance must be deemed void. It is in his power, however. to elect which of two such offices he will hold, and, if present, he should declare which he vacates, that the meeting may at once proceed to fill it. If absent, his acceptance of the office of trustee, in preference to any other district office, is to be presumed.

While the session continues, the meeting has power, under a resolution to reconsider its proceedings, to make a new election, although a person has been then elected with his assent (*see Digest, ante, p.* 19), because the right to the office is not complete until the inhabitants by separating have left it incumbent upon the person elected to enter upon his duties. If, however, they separate, an adjourned session has no power to oust an officer elected (*see Digest, ante, p.* 16), though they may fill a vacancy, existing by his refusal to accept. (*Digest, ante, p.* 100.)

The inhabitants have the power and it is their duty to fill every vacancy existing in a district office at *any* meeting, notwithstanding it has existed more than one month. (*Digest, ante, p.* 105.) If the vacancy has been created by any other cause than the expiration of the incumbent's term, it is advisable that a resolution should be passed declaring such vacancy to exist, and expressly stating the ground on which the meeting adjudges the office vacant. Cases are reported (*Digest, ante, pp.* 51, 53) where removal from a district, though not such as to forfeit the rights of the party as an inhabitant, and where an actual incapacity to serve, though not declared by law, have been held sufficient to justify treating them as creating a vacancy. In such cases, the officer removing, or becoming incapable, for any reason, of discharging his duties, ought to furnish written evidence thereof by a tender of his resignation. If he omits to do so, it is for the appointing power to judge in the first instance whether a vacancy exists; and although it may err in so declaring, the officer appointed will be deemed an officer *de facto*, and his acts in relation to the public and third persons deemed valid, until his election is pronounced void.

4. To designate a site for a district school house: This should be done by a resolution describing the metes and bounds in such a manner that a surveyor can lay it out without recourse to any other document, or to oral instructions. (*See Digest, ante, p.* 33.) The power of designating a site cannot be delegated to the trustees. (17 *Wend.*, 437.)

They or any other committee may be charged by the inhabitants with making the necessary examinations as to location, title, price, &c., but it is not until the meeting have acted upon their report that a site is designated. Nor is the site then established, so as to require a special meeting to change it, until a title has been acquired or legal obligations incurred by the trustees in behalf of the district by a valid contract for the purchase (*see Digest, ante, p.* 76), which, to be binding under the statute of frauds, must be in writing, under seal and subscribed by the parties to be bound thereby.

The question frequently arises whether the district has a title to a site, so as to render a new designation equivalent to an *additional* site requiring the consent of the school commissioner under the 8th subdivision of this section, or a *change* of site requiring a meeting called by special notice for that purpose. It is ordinarily started in consequence of doubts, as to the title of a site actually occupied or claimed by the district, growing out of the want of a deed, or the loss of a deed without its having been recorded, where one was originally executed.

A right in real estate may be acquired either by grant, by deed duly executed and delivered, or by an adverse possession of twenty years under claim of title, in which case the law presumes a grant, or by a valid contract for the conveyance, where a court of equity will enforce a specific performance, or in the case of the public by dedication.

In reference to the first mode: In the case of occupation under a grant, it is not material that the deed has been lost, for the paper itself is but evidence of the fact, and upon showing its loss, the existence and contents of the deed may be proved by other testimony; nor is the fact of its not having been recorded material, for the recording act is only for the benefit of purchasers in good faith and without notice, and the possession of real estate is held by the courts to be sufficient notice to put a purchaser upon inquiry as to the rights of the party in possession, and to charge him with notice of all facts to which such inquiry might have led. (*See Digest, ante, p.* 7.)

As to the second mode, or adverse possession: A naked possession, not accompanied with any claim of right, will never constitute any bar but will enure to the advantage of the real owner. The Code of Procedure provides that the occupation "shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years," and it defines what kind of possession shall be deemed adverse, as follows: "Whenever it shall appear that the occupant or

those under whom he claims entered into the possession of premises under claim of *title, exclusive of any other right*, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim for twenty years." "Where it shall appear that there has been an actual continued occupation under claim of title, exclusive of any other right, but not founded upon a written instrument or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely." It provides in the latter case that "land shall be deemed to have been possessed and occupied in the following cases only:

"1. When it has been protected by a substantial inclosure;

"2. When it has been usually cultivated and improved." (*See Code of Procedure, in appendix to Session Laws of* 1851, *p.* 33.)

Where there has been an *actual occupation* of premises in either of the modes above described, an *oral claim* of exclusive right is sufficient, without the pretension that such claim is founded upon a written instrument, and a claim of title even under a paper altogether void and inoperative as a deed, will yet characterize a possession as adverse. (24 *Wend.*, 604.) The possession is evidence only of such title as the party has asserted. If, therefore, the claim has been only to hold at sufferance, or conditionally, or for a term of years, it can never ripen into a better title.

As to the third mode: An equitable title is acquired where a party has entered into possession under a contract for a conveyance, and has performed or tendered performance of the conditions upon which by the contract the legal title was to be transferred. A court of equity will enforce such a contract, where there has been a partial execution of it by the transfer of possession on the one side and by payments on the other, notwithstanding the contract was by parol, and void under the statute of frauds. Every case of this character will require the careful examination of counsel into all the facts, and no discussion of the principles applicable thereto would be profitable in this place.

Fourthly, land may be dedicated to pious and charitable purposes (and such is the establishment of a school), with or without writing, by express declaration of the party thus devoting it, or by unequivocal acts on his part, such as marking a lot in the plot of a tract divided by him into town lots as the "school lot," and referring to such plot in his

deeds of conveyance, as was the case in 11 Pa. State Rep., 444. All that is required is the assent of the owner of the land, clearly manifesting his purpose to make a permanent appropriation, and the fact of its being used for the public purpose intended by the appropriation. (*See* 6 *Hill*, 412.)

5. To lay such tax on the taxable inhabitants of the district as the meeting shall deem sufficient to purchase or lease a suitable site for a school-house, and to build, hire or purchase such school-house, and to keep in repair and furnish the same with the necessary fuel and appendages: It is not necessary to designate a site before laying a tax to build a school-house. (17 *Wend.*, 437; 3 *Denio*, 116.) The same rule will apply to a tax for the purchase of a site. The inhabitants may vote such tax as they "deem sufficient," and if, upon the selection of a site and the negotiation for its purchase, the tax is found to be, in fact, insufficient, may vote a further tax. If it be found unnecessarily large, they may vote to refund the excess to the tax payers or appropriate it to any purpose for which they have power to lay a tax. (*Com. School Dec.*, 315.) There is no limitation to the amount which may be voted for the purchase of a site (*Digest, ante, p.* 41), and the expense of investigating the title and recording the deed may legitimately be included. (*Digest, ante, p.* 15.) The purchase of additional ground to enlarge the site is not a *change* of site, and does not require the vote of a meeting called by special notice, nor the consent of the school commissioner. (*Digest, ante, p.* 34.) Though the statute authorizes the leasing of a site, it does not permit the contracting of a permanent debt for the future rent. (*Digest, ante, p.* 32.) It is not uncommon for districts to hold land under lease granting it for a consideration, paid in advance, so long as the same shall be used for the site of a school-house or the purpose of a district school. It is greatly to be preferred that the district should obtain an indefeasible estate in fee simple, and, whenever possible, it should be procured; but, inasmuch as there is no compulsory process provided by the laws of this state by which the title to land for school purposes can be transferred, where the owner is unwilling, a district is sometimes under the necessity of accepting an inferior estate. In such cases a question often arises as to the right of the district to the school-house at the expiration of the term for which the land is held. The law is thus stated by Judge Harris (7 *Barb.*, 266): "Any one who has a temporary interest in land, and who makes additions to it or improvements upon it for the purpose of the better use or enjoyment of it, while such temporary interest continues, may, at any time before his right of enjoyment ceases, rightfully

remove such additions and improvements. If he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes, to all intents, a part of the inheritance, and the tenant, as well as any other person who severs it, becomes a trespasser. I think this may now be stated to be the general rule in respect to fixtures which a tenant attaches to the freehold. To this extent has the original rule of the common law yielded to the changed condition of society. There may be exceptions to the general rule I have stated, but I think they will be found limited to cases where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession."

A tax voted for the purchase of a site cannot be voted by instalments. (*Digest, ante, p.* 79.)

While it is no objection to a tax that a title has not been acquired, it is the duty of the trustees not to part with the money without receiving a conveyance (*Digest, ante, p.* 54), and in respect to this duty, a question frequently arises about incumbrances by way of mortgage. The vote appropriating money for the purchase of a site is to be construed as limiting the amount the district can at any time be called upon to pay for it, and therefore implies (unless the contrary expressly appears) a title free from any incumbrance. Where a portion of a tract subject to mortgage is purchased, the rule of law is that upon a foreclosure the land remaining the property of the mortgagor shall be first sold, and if that prove insufficient to satisfy the mortgage, then that which he has conveyed is to be sold in the inverse order of alienation; that is to say, that which he conveyed latest is to be sold first. It may frequently happen that the district will have ample security, in the land retained by the person from whom it derives title to a site, for its indemnity against a mortgage, and that the existence of a mortgage, covering land greatly exceeding in value the amount secured thereby, will be but a nominal incumbrance and no serious objection to the title. If this be clear, however, there will ordinarily be little difficulty in procuring from the holder of the mortgage a release of the site from its lien. If the trustees fail in obtaining it, they will be justified in requiring an express vote of the district, after laying the facts before a meeting, before paying for the site or making any expenditure or contract for building upon it.

In regard to the power to vote a tax for a school-house, the question sometimes arises how far it is permissible that the house should be connected with other erections made for different purposes, and subject to other control than that of the district. It is held that there can be no partnership in the erection of a school-house which will prevent the district from controlling it entirely for the purpose of a district school, and that a tax cannot be voted for a building for joint use, as a church and school-house or an academy and school-house. (*Com. School Dec.*, 201, 290.) It is not essential, however, to constitute a house, that it should include the whole of the building in which it is contained. Apartments, with an outer door to each, and having no communication with each other, are considered as distinct houses, though they originally made but one. (6 *Mod. R.*, 214.) In 6 Metc., 510, the supreme court of Massachusetts held that "if, under color of this corporate power of a district, the district should vote to erect an expensive and ornamental building, with a view to improve the neighborhood, to enhance the value of real estate, to accommodate societies, lecturers, dramatic exhibitions, or even to have a convenient place for religious meetings or public worship, or for any other use than that of a district school, it would not be within the legitimate authority of a school district, and any vote to levy a tax on the inhabitants for such purpose would be void." In that very case, however, the court sustained a tax of $1700, voted with liberty to certain persons "to build a hall over the school-house, with the privilege of an entrance and stair-way in the front entry of said house, in consideration that the district may have the use of said hall, free of charge, for all school district meetings, for all examinations of its schools, and for the delivery of lectures on the subject of education, no public meeting being held in said hall during the usual school hours unless by consent of the prudential committee of the district, and the proprietors of said hall insuring the whole building." In 1 Metc., 541, it was held that tenements are as essentially distinct when one is under the other, as where one is by the side of the other; and in 4 Mass. R., 576, the court say that "in legal contemplation, each of the parties has a distinct dwelling-house, adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house." (*See also* 10 *Conn. R.*, 318.)

While it is very desirable that every district should own an ample and commodious school-house, entirely separate from every other building, it sometimes happens in feeble districts that the scantiness of its

means renders it necessary to consult economy by uniting with a religious society or other association in erecting two houses under the same roof; the upper story, for example, being a church or town hall, while the lower is a school-house. No legal objection is conceived to exist to such an arrangement, provided the district secures by proper covenants: *First*, The undivided control at all times of the school-rooms and of the doors and passages affording access thereto. *Second*, That the other rooms shall not be used at any time during school hours for an assemblage or purpose which can distract the attention of pupils, or interfere, by noise or otherwise, with their instruction. *Third*, That the parties using the other rooms shall pay the whole, or a definite proportion, of the expense of such repairs upon those rooms, or the roof or other parts of the building, as the district shall from time to time deem necessary for maintaining the school-house in good condition and protecting it from injury by leakage or otherwise. *Fourth*, That those parties shall pay the expense of any insurance (not in a *mutual* company, as the district has no power to enter into such a contract as their policies create) necessary to protect the district from the increased risk of fire, caused by any use to which the other parts of the building may be put. The best mode to secure the performance of these covenants is for the district to insert them as a condition, in a lease of the rooms, to be executed by the trustees — the district retaining the general title to the site and everything upon it — and the lease to terminate upon a breach of any of the conditions, besides authorizing, in express terms, the trustees to recover any damages the district may sustain by a failure to perform any of the conditions. It should also contain an express provision that whenever a district meeting shall determine that the residue of the building is needed for school purposes, the same shall become its property upon payment of the then appraised value of the labor and materials used in its construction.

A fence, separate privies for the two sexes, wood-house, stoves, stove-pipe and bell have been held to be necessary appendages to a school-house, or rather that it is within the discretion of a district meeting to adjudge them such and vote a tax therefor.

Money cannot be raised by a tax in a school district for *contingent* purposes (*Com. School Dec.*, 233, *and Digest*, *ante*, *p.* 8), nor can a tax be voted for *arrearages* generally, or to reimburse trustees or other officers of the district for moneys expended by them, unless it appears by the vote that the money is to be applied to one of the objects for which taxes may by law be raised. (*Id.*, 316.)

Where a tax is voted by the inhabitants for any purpose, the specific amount of the tax and the particular purpose for which it is designed should be fully and clearly stated. (*Digest, ante, p.* 94.) And where several objects of expenditure are to be provided for, the amount to be raised for each should be expressed in the resolution, in order that the district and the trustees may know the precise extent of their liability and the mode of its application. There may be cases, however, where the necessary amount to be raised cannot be ascertained with any approach to accuracy, and in such cases the district may direct the performance of specific acts by the trustees, or authorize them to incur such expenses as may be necessary to the accomplishment of a particular object to be specified, and the trustees are then authorized by § 109, chap. 480 of 1847, No. 117, to raise such amount by tax upon the district, in the same manner as if the definite sum to be raised had been voted. This provision was held in 4 Denio, 248, to cover a case where the trustees were directed to build a house of specified dimensions and to let the job of building to the lowest bidder, which had the effect of restricting the expense to a less sum than four hundred dollars; and the court say that "if the district had left the whole to the discretion of the trustees, and they had kept within the four hundred dollars, the act would have authorized the raising of the money. (*See also* 5 *Hill*, 44, *and Digest, ante, p.* 50.) It was held by Supt. Young that the inhabitants of a district may legally vote a tax to *enlarge* their school-house, notwithstanding it may already have cost $400, without a certificate from the town superintendent. This general delegation of authority should, however, be resorted to only in cases of necessity.

It was held (24 *Wend.*, 266) that the direction in the vote of a tax for repairs, that the *collection* was to be postponed until the repairs were done, did not invalidate the resolution or the tax, the tax list being made out thirty days after the vote.

6. To alter, repeal and modify their proceedings from time to time, as occasion may require: The power to repeal proceedings must be exerted before they have been carried into effect, so that other parties have acquired rights or incurred responsibilities under them. Thus, where a tax list and warrant had been made out but not delivered to the collector, the inhabitants were held to have the power to rescind the vote imposing the tax (4 *Hill*, 109), but not where the greater part had been collected. (4 *Barb.*, 25.) Where trustees have made a contract under the authority of the district, it is in effect the contract of the district, and it is beyond its power to rescind the contract by repealing the resolution in pursuance

of which it was made. A full release of damages from all persons having acquired any right of action, or the restoration of things to the same condition as they were in when a resolution was passed, might give the district the right to repeal or modify it.

Any resolution directly or necessarily repugnant to a previous one repeals it; and the rule in relation to statutes is laid down (3 *How., U. S. R.*, 636), that if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the prior one. As repeals by implication are not favored by the courts, it is advisable that a resolution should be repealed in express terms, where such is the intention. When this is proposed at the same meeting (including adjourned sessions thereof) at which the resolution was passed, it is usually by a motion for reconsideration. The general parliamentary rule is, that the motion to reconsider can only be made by a person who voted with the successful side upon the question to be reconsidered. The reason of the rule is, that but for it the members in the minority might exhaust the time of the meeting fruitlessly; for it is to be presumed that the vote will be the same, unless the contrary is shown by some person who voted with the majority indicating a change of mind. It was held (*Digest, ante, p.* 90) that this rule does not prevail in a district meeting unless the meeting adopts it. In that case the majority of the meeting chose to disregard it. Nevertheless it is a very proper rule of order to be applied by the chairman, subject to a reversal on an appeal to the meeting from his decision; when, if a majority wish to reconsider, they can indicate it by overruling him. If a motion to reconsider is carried, the resolution to which it relates is open to amendment, and, if not again passed in its original or an amended form, is rejected. If, without taking the question on the original resolution a second time, the meeting separates for an adjourned session, it may then be called up and adopted or rejected.

The unqualified repeal of a repealing statute revives the original enactment. This rule was applied, in 2 Denio, 233, to a vote on the 5th December, repealing a vote of Nov. 25th, which latter repealed the vote for a tax, passed Oct. 7th, and it was held that the vote for a tax was renewed on the 5th December, though a tax list made out under the original vote fell to the ground, and a new one was required to be made *after* December 5th.

It is obvious that the meeting cannot do, under the form of reconsidering or modifying a former proceeding, what it could not do directly;

and therefore, though it may rescind a resolution designating or changing a site (*Digest, ante, p.* 64), it cannot adopt a new one, unless it was called, or be an adjourned meeting which was called, by a special notice for that purpose.

7. To vote a tax for the purchase of a book for the purpose of recording the proceedings of their respective districts: The importance of full and exact records of district proceedings cannot well be exaggerated. They ought to be so kept as to show upon their face every fact of which it might be necessary to give evidence in a suit at law, in order to establish the validity of every resolution adopted. For example, the order of the trustees for calling a meeting, the return of the clerk showing upon whom and in what manner he had served notice, the consent of the school commissioner or supervisor when required to authorize a proceeding, might much better be engrossed in the book of records, in the first instance, than left to rest upon the uncertain custody of loose pieces of paper. It may be necessary to prove the facts at a remote period of time; and the way to avoid controversy in respect to them is always to act upon the presumption that controversy will arise, and to prepare the evidence, in advance, to meet it. The habit of doing this will of itself do much to preclude all opportunity for cavil.

It is always desirable that the records should show who was present and took part in the proceedings of each meeting. For this purpose the orderly method of proceeding would be for the clerk (or person officiating as such), immediately after the organization of the meeting, to read the order under which it was called, and the list from his return of the persons on whom he served notice, requesting each one present to answer as his name is read; noting, upon the minutes: "On reading the clerks' return of the inhabitants on whom he had served notice, the following were found to be present, viz: Abraham Jackson, Abraham Jackson, Jr., &c., &c." At an annual meeting, for which no personal service of notice is necessary, the clerk could call the roll from a list of the inhabitants alphabetically arranged. In either case he should note on the minutes the presence of every voter, although no notice had been served upon him.

If any person offering to vote is challenged, the fact should be noted in the minutes, and also whether he made or declined making the declaration required by law. This is important, because no person will be permitted to question the proceedings of a meeting on the ground of the illegality of a vote, if he stood by and saw it offered without objection, unless he shows himself to have been ignorant of the facts which

would have required him to object. Nor will the illegality of the vote be regarded unless it affected the result, and, therefore, it is highly desirable that the minutes should show how each person voted on each proposition submitted to the meeting. The christian names of the voters should be given, and not merely their initials.

It is proper, but not legally necessary, that the minutes should be read over to the meeting, for its approval or correction, if need be, before the adjournment. In order to enable the clerk to do this, all resolutions should be reduced to writing before the question upon them is taken.

As the cost of a little paper is of the most trifling consequence in comparison with the advantages of having a neat and accurate history of district proceedings in a shape for convenient consultation, it would be well for each district to provide a book of records, of at least foolscap size, firmly bound, and containing a sufficient number of pages to contain ample records for a series of years.

8. With the consent of the [school commissioner] of the town, to designate sites for two or more school-houses for such district, and lay a tax on the taxable property in such district to purchase or lease such sites, and to hire, build or purchase such school-houses, and to keep in repair and furnish the same with necessary fuel and appendages, and may also in their discretion lay a tax, not exceeding twenty dollars in any one year, to purchase maps, globes, black-boards and other school apparatus: The provision for more than one site and school-house is intended to obviate the inducements to a division of districts. There are great advantages in large and populous districts; and it has always been the policy of the department to discourage their division, unless it becomes necessary on account of the great distance which children are compelled to travel in going to school. It may often be convenient to have a school-house for very young children separate from that attended by those more advanced. In cases of dissatisfaction with a teacher, there is the opportunity for parents to exercise a choice, without the serious injury to the course of instruction which results from withdrawing their children entirely from the public schools. It may frequently be profitable to hire temporarily a building or rooms for an additional school-house, where there is not such an absolute *necessity* for it as would prompt the trustees to exercise that power under § 120, chap. 480 of 1847, *post*, No. 148, without the vote of the district.

It is to be remembered that, however many school-houses or teachers there may be in the district, the attendants in all constitute but one school. (*See p.* 126, *ante.*)

The principal facts in geography are learned better by the eye than in any other manner, and there ought to be in every school room a map of the world, of the United States, of this state and of the county. Globes, also, are desirable, but not so important as maps. Large blackboards, in frames or plaster, are indispensable to a well conducted school. The operations in arithmetic, performed on them, enable the teacher to ascertain the degree of the pupils' acquirements better than any result exhibited on slates. He sees the various steps taken by the scholar, and can require him to give the reason for each. It is in fact an exercise for the entire class; and the whole school, by this public process, insensibly acquires a knowledge of the rules and operations in this branch of study.

Cards, containing the letters of the alphabet or words, may be usefully hung up in the room. Indeed, the whole apparatus provided by Mr. Holbrook and others is eminently calculated to facilitate the acquisition of knowledge and to render it agreeable.

There is some difficulty in limiting definitively the meaning of the words school apparatus. Few would hesitate to admit that a copy of Webster's Dictionary, or an atlas for reference by teacher and pupils, came fairly within the intent of the statute. If the inhabitants should deem it proper to furnish, by tax, text books to be used by the pupils in school, after it had provided the articles specifically named in the statute, it would not appear an unreasonable exercise of their discretion.

No. 96. No tax to be voted by a district meeting, for building, hiring or purchasing a school-house, shall exceed the sum of four hundred dollars, unless the [school commissioner] of the town in which the school-house is to be situated shall certify in writing his opinion that a larger sum ought to be raised, and shall specify the sum, in which case a sum not exceeding the sum so specified shall be raised; and in districts composed of parts of several towns, the certificate of a major part of the [school commissioners] of said towns shall be necessary for such purpose. (*Sec.* 70, *chap.* 480 *of* 1847, *modified in conformity to No.* 65.)

It is the *tax* that is limited to $400, not the expense of building the house, which may include, in addition, the avails of the sale of the former house and site. So much of the decision on page 31 Digest, *ante*, as seems to conflict with this has been expressly overruled. If, after the expenditure of $400 in building the house, the tax is found insufficient

to finish it, the commissioner may certify that the further sum necessary, specifying it, ought to be raised, and the inhabitants may vote a tax for the amount so certified. (*Com. School Dec.*, 258.) If this additional amount prove insufficient, the commissioner may again certify and the inhabitants vote a further tax. (*Id.*, 340.)

The commissioner whose certificate is to be obtained is the one having jurisdiction of the town in which the school-house *is to be* erected. The law forbids the division of a town in forming an assembly district or in dividing a county into school commissioners' sections. Section 40, chap. 480 of 1847, also provides that "no school-house shall be erected so as to stand on the division lines of any two or more towns." This provision remains in full force, though the residue of that section has become obsolete. The statute is nevertheless peremptory in requiring the certificate of a major part of the commissioners having jurisdiction in the several towns of which a joint district includes any part. In such a case it is necessary to the validity of a tax, exceeding $400, not only that a majority of the commissioners should certify, but that the commissioner having jurisdiction of the town in which the school-house is to be situated should be one of that majority.

The limitation of this section applies only to the *school-house*. The amount of tax which may be voted for purchase or lease of site, and for repairs, furniture, fuel and appendages, is left wholly to the discretion of the district. (*See Digest, ante, p.* 41.)

No. 97. Whenever a majority of all the taxable inhabitants of any school district, to be ascertained by taking and recording the ayes and noes of such inhabitants attending at any annual, special or adjourned school district meeting legally called or held, shall determine that the sum proposed and provided for in the next preceding section shall be raised by instalments, it shall be the duty of the trustees of such district, and they are hereby authorized, to cause the same to be levied, raised and collected in equal annual instalments, in the same manner and with the like authority that other school district taxes are raised, levied and collected, and to make out their tax list and warrant for the collection of such instal ments, as they become payable, according to the vote of the said inhabitants, but the payment or collection of the last instalment shall not be extended beyond five years from the time such vote was taken; and no vote to levy any such tax shall be reconsidered except at an adjourned, general or special meeting, to be held within thirty days thereafter, and the

same majority shall be required for reconsideration as is required to levy such tax. (*Sec.* 71, *chap.* 480 *of* 1847.)

No other tax can be raised by instalments under this section than one for building, hiring or purchasing a school-house, and in that case only when it exceeds $400. (*Digest, ante, pp.* 79 *and* 99.) The instalments must be *equal* and *annual*, and cannot be distributed in unequal amounts, or with any other interval between successive ones than a year. (*See Digest, ante, pp.* 67, 68, for an exposition of the vote required to direct the levy of a tax by instalments.) A majority of the *voters* present may (with the certificate of the commissioner) lay the tax to be collected immediately, but it is required that they should also constitute a majority of the *taxable inhabitants attending* for the purpose of directing the manner of its collection by instalments.

The general practice has been, and it is believed to accord best with the intent of the statute, for the trustees to make out their tax list for the first instalment upon the taxable property as it then exists, and for their successors to make separate tax lists each year thereafter upon the taxable property as it exists at the time the instalments respectively become payable. Persons may thus become subject to the tax who had no means of resisting its imposition; but the erection of a school is to be regarded as a permanent benefit to the district, and they voluntarily assume the burden of paying for it by becoming inhabitants. It would seem necessary that the warrant for the collection of the last instalment should be returnable within five years from the time of taking the vote, and therefore that the tax list for it should be made ont at least thirty days before that time.

The sum of $100, with interest at seven per cent, may be paid by two annual instalments of $55.30.9 each; by three of $38.10.5; by four of $29.52.3; by five of $24.38.9. In order to provide for the payment of any sum, with the interest on it at seven per cent, in *equal* annual instalments, the sum must be multiplied by the decimal fraction .55309179 for two years, .38105168 for three, .29522812 for four, or .24389069 for five, the first instalment being in each case payable at the expiration of a year from the time to which the computation relates.

No. 98. Whenever a school-house shall have been built or purchased for a district, the site of such school-house shall not be changed, nor the building thereon be removed, as long as the district shall remain unaltered, unless by the consent, in writing, of the [supervisor] of the town or towns within

which such district shall be situated, stating that in their opinion such removal is necessary; nor then, unless a majority of all the taxable inhabitants of said district, to be ascertained by taking and recording the ayes and noes at a special meeting called for that purpose, shall be in favor of such new site. (*Sec.* 73, *chap.* 480 *of* 1847, *modified in conformity to No.* 56, *ante.*)

Any alteration of the territory of the district, however trifling, made subsequent to the building or purchase of a school-house, dispenses with the necessity of the consent of the supervisor to authorize a district meeting to change the site of *that* school-house (*Digest, ante, p.* 98), but no change of the *inhabitants* constitutes an alteration unless accompanied by a change of boundaries.

The site may be changed, so far as the prohibition of this section affects the question, at any time before a *school-house* standing thereon shall have been built or purchased. (*Com. School Dec.*, 182.) But after the *site* has been purchased, or the trustees have made themselves legally responsible by a valid contract to purchase it, in pursuance of a resolution of the district, it becomes an established site, so that the resolution cannot be rescinded, under the general principle that a resolution which has been executed cannot be revoked to the prejudice of those who have acquired rights under it. (*See Digest, ante, p.* 76, and comments under sixth clause of No. 89.) In such case, therefore (unless an intermediate alteration of the district has taken effect), the assent of the supervisor is requisite to change the site, or that of the commissioner to procure an additional one.

If the title to a site fails, the designation of a new one is not to be regarded as a change of site. (*Digest, ante, p.* 62.) The resolution in such case should recite the fact that the district is destitute of a site, in consequence of its title to one formerly occupied having failed by the termination of a lease, judgment in an action of ejectment, or whatever other circumstance may have brought it to an end.

The majority requisite to a change of site is a majority of those *present and voting*, as ascertained by taking and recording the ayes and noes at a special meeting *called for that purpose.* (*Digest, ante, p.* 65; 4 *Grattan*, 530.)

The certificate of the supervisor is to state that in his opinion a removal or change of site is necessary and that he consents to such removal. The intent of the statute is to render his certificate necessary to give the meeting jurisdiction of the subject of a change of site, but not to give

him a negative upon the selection which it may make of a new site. It is not for him to assent or dissent to a removal to any particular location, but only to guard the district from being put to trouble by frivolous agitation of the subject, where, in his judgment, there is no such inconvenience in the existing location as to justify a change.

In a joint district, composed of parts of two towns, both the supervisors must unite in the certificate; if composed of three or more, the case comes under the provision of § 27, title 17, chap. 8, part 3, of the Revised Statutes: "Whenever any power, authority or duty is confided by law to three or more persons, and whenever three or more persons are authorized or required by law to perform any act, such act may be done, and such power, authority or duty may be exercised and performed by a majority of such persons or officers, upon a meeting of all the persons or officers so entrusted or empowered, unless special provision is otherwise made."

The act in this case being of a judicial character, *all* must meet and confer, but a majority may decide. The certificate should state that all met.

No. 99. Whenever the site of a school-house shall have been changed, as herein provided, the inhabitants of the district entitled to vote, lawfully assembled at any district meeting, shall have power, by a majority of the votes of those present, to direct the sale of the former site or lot, and the buildings thereon and appurtenances, or any part thereof, at such price and upon such terms as they shall deem most advantageous to the district; and any deed duly executed by the trustees of such district, or a majority of them, in pursuance of such direction, shall be valid and effectual to pass all the estate or interest of such school district in the premises, intended to be conveyed thereby, to the grantee named in such deed; and when a credit shall be directed to be given upon such sale for the consideration money, or any part thereof, the trustees are hereby authorized to take, in their corporate name, such security, by bond and mortgage or otherwise, for the payment thereof as they shall deem best, and shall hold the same as a corporation, and account therefor, to their successors in office and to the district, in the manner they are now required by law to account for moneys received by them; and the trustees of any such district for the time being may, in their name of office, sue for and recover the moneys due and unpaid upon any security so taken by them or their pre-

decessors in office, with interest and cost. (*Sec.* 74, *chap.* 480 *of* 1847.)

Neither the trustees nor the inhabitants have any power to sell land belonging to the district, unless it be the site of a school-house, for which a new one has been substituted.

If any credit is to be given upon the sale, the inhabitants in district meetings should, by resolution, specify the exact terms thereof, and should also fix the lowest price to be accepted. When a bond and mortgage are executed, they should run, to "A. B., C. D. and E. F., trustees of school district No. , in the town of , and their successors in office or assigns."

The trustees become personally responsible to the district for the amount bid at the sale as for so much cash received, unless they take a bond and mortgage or some other *security*. This implies some pledge or obligation collateral and in addition to the personal responsibility of the purchaser, such as the signature of a solvent indorser or surety to a promissory note, in accepting which they are responsible for the same care which a prudent person would exercise in taking security for a debt due to himself.

No. 100. All moneys arising from any sale made in pursuance of the last preceding section shall be appropriated to the payment of the expenses incurred in procuring a new site and in removing or erecting a school-house, or either of them, so far as such application thereof shall be deemed necessary. (*Sec.* 75, *chap.* 480 *of* 1847.)

If the money is not necessary to pay for a new site or removing or erecting a school-house, it may be appropriated by the district to any purpose for which it would be authorized to levy a tax; and in the absence of any vote by the district the trustees may appropriate it to any purpose, such as the purchase of fuel, the exemption of indigent inhabitants from rate bills, or the rent of temporary school rooms, for which they are authorized to levy a tax without a vote of the district.

No. 101. Where, by reason of the inability to collect any tax or rate bill, there shall be a deficiency in the amount raised, the inhabitants of the district in district meeting shall direct the raising of a sufficient sum to supply such deficiency by tax, or the same shall be collected by rate bill, as the case may require. (*Sec.* 84, *chap.* 480 *of* 1847.)

The inability to collect a tax or rate bill is to be ascertained from the return of the collector, *under oath*, containing an account of the sums remaining unpaid, and testifying that after diligent efforts he has been unable to collect the same. The inhabitants have the right, and should in general exact such evidence, but it is in their power to waive it. (*Digest, ante, p.* 19.) The taxes authorized by this section are not to be confounded with that for the amount of *exemptions* in a rate bill, which it is the duty of the trustees to collect by tax without the action of a district meeting, and which must be certified before the issuing of their warrant, and consequently before any effort to collect.

The last clause, "or the same shall be collected by rate bill," must be construed as relating to the duty of trustees. It would seem to be very clear that where there is an inability to collect a rate bill, by reason of the poverty of the individual against whom it has been made, it is a case which requires a tax.

No. 102. The taxable inhabitants of each school district in the state shall have power, when lawfully assembled at any district meeting, to lay a tax on the district, not exceeding ten dollars in any one year, for the purchase of a district library consisting of such books as they shall in their district meeting direct, and such further sum as they may deem necessary for the purchase of a book case. The intention to propose such tax shall be stated in the notice required to be given of such meeting. (*Sec.* 133, *chap.* 480 *of* 1847.)

Section 135 of the act of 1847, following chap. 80 of 1835, from which it was taken, directs that "the taxes authorized by the foregoing section shall be assessed and collected in the same manner as a tax for building a school-house."

The books to be purchased by tax under this section are such as the district meeting shall direct, while those purchased by the library money *apportioned* to the district are selected by the trustees. The meeting may adopt such regulations as it deems proper for the management of so much of the library as is purchased by a district tax, while the general regulations in respect to those bought by money received from the state are prescribed by the State Superintendent.

A special notice of the intention to propose a tax for such purpose is necessary to give the meeting power to lay one for the purchase of a library or book case.

No. 103. * * * * Whenever the number of volumes in the district library of any district, numbering over fifty children between the ages of five and sixteen years, shall exceed one hundred and twenty-five, or of any district numbering fifty children or less, between the said ages, shall exceed one hundred volumes, the inhabitants of the district qualified to vote therein may, at a special or annual meeting duly notified for that purpose, by a majority of votes appropriate the whole or any part of the library money belonging to the district for the current year to the purchase of maps, globes, black-boards or other scientific apparatus for the use of the school; and in every district having the required number of volumes in the district library, and the maps, globes, black-boards and other apparatus aforesaid, the said moneys, with the approbation of the State Superintendent, may be applied to the payment of teachers' wages. (*Sec.* 136, *chap.* 480 *of* 1847.)

The act of 1851, which prescribed the ages of four and twenty-one years as those within which children are to be enumerated as pupils, did *not* amend the preceding section. In order, therefore, to authorize a district to apply its library money to the purchase of scientific apparatus, or, with the approbation of the State Superintendent, to paying teachers' wages, it must number over fifty children between the ages of *five* and *sixteen*, and actually have in its library over one hundred and twenty-five volumes, or over one hundred volumes if the number of children between those ages be less than fifty. The mere fact that the district has at some previous time possessed the requisite number of volumes is not sufficient.

On making an application to the State Superintendent, the facts must be proved by an affidavit, stating the number of children, the number of volumes actually in the library, and enumerating what maps, globes and other scientific apparatus have been procured and are actually in use in the school.

The vote of a district and the permission of the State Superintendent relate only to the application of library money *for the current year*, and must be annually renewed to justify any diversion of it from the purchase of books.

No. 104. The trustees chosen at the first legal meeting of any school district shall be divided by lot into three classes, to be numbered one, two and three; the term of office of the first class shall be one year, of the second two, of the third

three; and one trustee only shall thereafter annually be elected, who shall hold his office for three years and until a successor shall be duly elected or appointed. In case of a vacancy in the office of either of the trustees, during the period for which he or they shall have been respectively elected, the person or persons chosen or appointed to such vacancy shall hold the office only for the unexpired term. (*Sec.* 63, *chap.* 480 *of* 1847.)

Prior to 1843, all the trustees were chosen annually, and held their office for but one year. By sec. 12, chap. 133 of that year, the mode of election and tenure of office were changed to the mode and tenure above prescribed. The intent of the statute is, that one trustee shall go out of office by regular expiration of his term, and a successor be chosen in his place at each annual meeting. As another vacancy may exist at the same time, caused by death, removal or other cause than expiration of term — which vacancy may have been temporarily filled by *appointment* — the statute prescribes that the person elected to fill such vacancy shall hold only for the unexpired term, so that the power of filling the office for three full years shall return to the inhabitants at the same time, as if no vacancy had occurred otherwise than by the expiration of a full term.

No. 105. The clerk, trustees, collector and librarian of each school district shall hold their respective offices until the annual meeting of such district next following the time of their appointment. (*Sec.* 76, *chap.* 480 *of* 1847, *as amended by sec.* 3, *chap.* 382 *of* 1849.)

It is a familiar rule of interpretation, that one part of a statute must be so construed by another that the whole may, if possible, stand. To apply this rule, the word *appointment*, in the preceding section, must be construed as used in contradistinction to election by the inhabitants. Otherwise the section would be entirely inconsistent with the preceding, as making the term of trustees but one year instead of three. It is to be understood, then, as meaning that in case of appointment of a trustee by the supervisor, or a clerk, collector or librarian by the trustees, the person so appointed holds to the next annual meeting, when, in the case of a trustee, the residue of the unexpired term, temporarily filled by the appointment, is to be filled by election.

No. 106. In case the office of trustee shall be vacated by the death, refusal to serve, removal out of the district, or incapacity of any such officer, and the vacancy shall not be supplied by a district meeting within one month thereafter, the [supervisor] of the town may appoint any person residing in such district to supply such vacancy. (*Sec.* 77, *chap.* 480 *of* 1847, *modified in conformity to No.* 56, *ante.*)

The power of the supervisor under this section, and of trustees under the next, to fill vacancies, is confined strictly to vacancies resulting from the causes above specified. They are not to assume to set aside an election on the ground of a legal incapacity existing at the time, and which the voters disregarded. (*Digest*, *ante*, *p.* 45.) They must, from the necessity of the case, adjudicate upon the question of fact whether a vacancy exists, and, in the written order making an appointment, should expressly state the facts which have caused a vacancy. See *Digest* (*ante*, *pp.* 51, 53), for cases of disability in fact to discharge the duties of an office constituting good cause for declaring it vacant.

A refusal to serve is not the defective performance or omission of a particular act, but a general non-performance of the duties of the office. (6 *Cowen*, 479.)

No. 107. In case of a vacancy in the office of school district clerk, collector or librarian, for any of the causes mentioned in the next preceding section, such vacancy may be supplied by appointment, under the hands of the trustees of the district or a majority of them, and the persons so appointed shall hold their respective offices until the next annual meeting of the district, and until others are elected in their places. (*Sec.* 78, *chap.* 480 *of* 1847.)

It is the design of the statute that officers shall hold over after the expiration of their term, so that the public interests shall not suffer for the want of a person competent and responsible for the discharge of every official duty. The office becomes vacant for the purpose of giving the inhabitants the power to elect; but, until they have done so, is not vacant, as to the power to discharge its duties.

The trustees should not reappoint a person who has refused to accept or to serve, or whose resignation has been accepted. The statute regards the penalty under the next section as an equivalent for the service. (11 *John.*, 432; *Digest*, *ante*, *p.* 2.)

No. 108. Every person duly chosen or appointed to any such office, who, without sufficient cause, shall refuse to serve therein, shall forfeit the sum of five dollars; and every person so chosen or appointed, and not having refused to accept, who shall neglect to perform the duties of his office, shall forfeit the sum of ten dollars. (*Sec.* 79, *chap.* 480 *of* 1847.)

These penalties are (by No. 53, *ante*) to be sued for by the supervisor, and their collection reported to the commissioner. They belong to the district for refusing to serve which they were incurred. What is sufficient cause for a refusal to serve is a question that must be determined by the tribunal in which the action is brought. The law regards every person as under an obligation to bear his part in the burden of personal service to the public, or to indemnify it by a fine. Mere unwillingness to abstract the necessary time from the labors of his ordinary calling is not a sufficient cause; it is for him to determine whether the payment of the fine, or the injury to his business, or love of ease, will be the greater damage, and to meet the one or the other according to his election. The presumption is that, if sufficient cause existed, the supervisor would have accepted the resignation of the officer who is sued; and it lies upon him to show the cause, not upon the plaintiff to disprove the existence of any.

No. 109. Any person chosen or appointed to any such office may resign the same, by presenting his resignation to the [supervisor] of the town where such officer shall reside, who is authorized, for sufficient cause shown to him, to accept the same; and the acceptance of such resignation shall be a bar to the recovery of either of the penalties mentioned in the preceding section. The [supervisor] accepting the resignation shall give notice thereof to the clerk or to one of the trustees of the school district to which the officer resigning shall belong. (*Sec.* 80, *chap.* 480 *of* 1847, *modified in conformity to No.* 56.)

In a joint district, a resignation can be accepted only by the supervisor of the town in which the officer resides; though the courts will probably hold that the supervisors of all the towns, any part of which is included in the district, should unite in an action for the penalty under the preceding section. In such a case each of the supervisors should report the recovery of a judgment to the commissioner, mentioning to whom it has been paid, who should be the supervisor of the town in which the school-house is situated.

DUTIES OF DISTRICT CLERK.

No. 110. It shall be the duty of the clerk of each school district:

1. To record the proceedings of his district in a book to be provided for that purpose by the district, and to enter therein true copies of all reports made by the trustees of his district to the [school commissioner];

2. To give notice of the time and place for special district meetings, when the same shall be called by the trustees of the district, to each inhabitant of such district liable to pay taxes, at least five days before such meeting shall be held, in the manner prescribed in the fifty-fifth section of this act (*No.* 82, *ante*);

3. To affix a notice, in writing, of the time and place for any adjourned district meeting, when the same shall be adjourned for a longer time than one month, in at least four of the most public places of such district, at least five days before the time appointed for such adjourned meeting;

4. To give the like notice of every annual district meeting;

5. To keep and preserve all records, books and papers belonging to his office, and to deliver the same to his successor in office; and in case of his neglect or refusal so to do, he shall be subject to a fine of not exceeding fifty dollars. (*Sec.* 81, *chap.* 480 *of* 1847, *modified in conformity to No.* 67.)

The importance of full and accurate records has been sufficiently enforced in the comment upon the seventh clause of No. 89. A clerk who discharges his duty in this respect with neatness and fidelity will have an honorable memorial of himself to endure as long as the district exists. The entering of copies of the reports, annually made by the trustees to the school commissioner, is of consequence to preserve the history of the district affairs, and to afford the means of comparison with the annual accounts presented by the trustees to the district meeting.

Too great care cannot be exercised in giving ample notice of every special meeting. The clerk is authorized to give such notices upon a verbal direction of the trustees (*Digest, ante, p.* 43); but there can be no excuse for the omission to put those directions in writing, upon the records, either in the form of an order or of minutes of the proceedings of a meeting of the trustees. In the personal service of notice, the clerk cannot act by deputy; but no objection is perceived to his

employing an agent to leave written notices at the houses of those whom he may find absent from home. The proper course, however, would be for the clerk to provide himself with a sufficient number of written notices before starting upon his rounds. In this way he would secure the giving of notice at the earliest practicable time, and would avoid the trouble of obtaining any other evidence of service than his own official return. The clerk is not at liberty to post notices of annual or adjourned meetings at any less number of public places than *four*. It would be well for him to have at least four places designated by a resolution of the inhabitants as the most public and proper for posting notices. In case of an adjourned meeting, it would be prudent to repeat in the notices posted the enumeration of the objects for which it was originally called, and to include any new proposition which may have been presented at the meeting.

OF THE DUTY OF TRUSTEES OF SCHOOL DISTRICTS.

No. 111. It shall be the duty of the trustees of every school district, and they shall have power:

1. To call special meetings of the inhabitants of such districts liable to pay taxes, whenever they shall deem it necessary and proper;

2. To give notice of special, annual and adjourned meetings in the manner prescribed in the last preceding section, if there be no clerk of the district, or he be absent or incapable of acting;

3. To make out a tax list of every district tax voted by any such meeting, containing the names of all the taxable inhabitants residing in the district at the time of making out the list, and the amount of tax payable by each inhabitant, set opposite to his name;

4. To annex to such tax list a warrant, directed to the collector of the district, for the collection of the sums in such list mentioned;

5. To purchase or lease a site for the district school-house, as designated by a meeting of the district, and to build, hire or purchase, keep in repair and furnish such school-house with necessary fuel and appendages, out of the funds collected and paid to them for such purposes;

6. To have the custody and safe keeping of the district school-house;

7. To contract with and employ all teachers in the district;

8. To pay the wages of such teachers, when qualified, by giving them orders on the [supervisors] for the public money belonging to their districts, so far as such moneys shall be sufficient for that purpose, and to collect the residue of such wages from all persons liable therefor;

9. To divide the public moneys received by them, whenever authorized by a vote of their district, into not exceeding two portions for each year; to assign and apply one of such portions to each term during which a school shall be kept in such district, for the payment of the teacher's wages during such term; and to collect the residue of such wages, not paid by the proportion of public money allotted for that purpose, from the person liable therefor, as above provided;

10. To exempt from the payment of the wages of teachers, either in part or wholly, such indigent persons within the district as they shall think proper, in any one quarter or term, and the same shall be a charge upon such district;

11. To certify such exemptions and deliver the certificate thereof to the clerk of the district, to be kept on file in his office;

12. To ascertain, by examination of the school lists kept by such teachers, the number of days for which each person not so exempted shall be liable to pay for instruction, and the amount payable by each person;

13. To make out a rate bill containing the name of each person so liable and the amount for which he is liable, and to annex thereto a warrant for the collection thereof;

14. To deliver such rate bill, with the warrant annexed, after the same shall have been made out and signed by them, to the collector of the district, who shall execute the same in like manner with other warrants directed by such trustees to such collector for the collection of district taxes. And the collector to whom any such rate bill and warrant shall be delivered for collection shall possess the same power, be entitled to the same fees, and subject to the same restrictions and liabilities, with their bail and sureties, as by this title is provided in proceedings to collect school district taxes. (*Sec.* 82,*chap.* 480 *of* 1847, *as amended by* §§ 6 *and* 12, *chap.* 382 *of* 1849.)

Before entering upon the detailed examination of this very important section, by its several clauses, the general rule must be reiterated that every power committed to the trustees must be exercised by the whole board meeting and conferring at the same time and place, and not by

one or two forming a determination and procuring the assent of the absent. The decision of the majority, *under such circumstances*, is the decision of the trustees. The general rule is that the decision of a majority, or even of all three under other circumstances, is *not* the decision of the trustees, any more than the concurrent opinion of all the members of the legislature, arrived at by taking their separate votes at their respective places of residence, is an act of the legislature. In the assessment of a tax, and in general in regard to every other duty judicial in its character, this rule is inflexible.

In other cases a majority may decide, provided all have been notified of the intention to meet and confer upon the subject at a definite time and place. This rule was applied in 16 Maine R., 185, and the dismissal of a teacher by two, a majority of the board, held illegal, because the third was not notified, although he was out of town. The court say: "That does not allow the majority to dispense with the rule requiring notice. They are not in such cases constituted the judges whether the notice would be effectual to secure his attendance. Nor would it be entirely safe to entrust them with such a power, as it would afford an opportunity to select an occasion when they might judge that a notice would be ineffectual, and thus, by neglecting to give it, free themselves from the presence of a dissenting minority. It may often happen that those will be able to attend who were believed to be so situated that their attendance could not be expected. Nor is there any difficulty in giving the requisite notice in such cases, as one left at the usual place of residence would be sufficient."

The law goes upon the supposition that a majority may be convinced by a minority and change its determinations, and therefore will not suffer the majority to act without giving the minority a notice to participate. The legal presumption is that officers have thus acted, but this presumption may be repelled by evidence to the contrary. (*See Digest, pp.* 82, 93, 95.)

The case last cited admits that a merely ministerial duty, the execution of a determination of the board, may be performed by a single trustee. (*See also p.* 88.)

In case of a vacancy in the office of trustee, those in office, whether two or one, possess all the powers of a full board (*Digest, p.* 15); the very first act, however, ought to be the call of a meeting to fill the vacancy.

We may proceed now to examine the powers of trustees as declared in the several clauses of the preceding section.

1. To call special meetings of the inhabitants of such districts liable to pay taxes, whenever they shall deem it necessary and proper: This powers should be liberally exercised for the benefit of the district; and the trustees should call special meetings whenever requested for any legal object by a respectable number of the inhabitants, notwithstanding the trustees may themselves be opposed to the object. The cases on pages 8, 20 and 77 Digest, *ante*, will be found to speak very strongly on this point. If the inhabitants have repeatedly acted upon a subject in such a manner as to show that their determination has been definitively formed, and is not likely to be altered, it is not the duty of the trustees to be made the instruments of a factious minority, by harassing them with calls for special meetings to reconsider the matter. But except in such case, or when the purpose is clearly illegal, it is very much a matter of course that a meeting should be ordered by the trustees, or, in case of their refusal, by the State Superintendent. Application to him for this purpose must be upon notice to the trustees, in the manner and form of an appeal from their refusal.

It is no objection to the call of a special meeting that a meeting having the same subject under consideration stands adjourned. (*Digest, pp.* 83. 98; *see also* 7 *Metcalf*, 509.)

2. To give notice of special, annual and adjourned meetings in the manner prescribed in the last preceding section, if there be no clerk of the district, or he be absent or incapable of acting: This is a ministerial duty, which may be performed by one of the trustees, under a resolution of the board, or they may divide the district into sections, assigning the duty of giving the notice in each to one of their number. This power should be exercised by them in the case of a refusal of the clerk to give a notice. It is believed they may in such case delegate the ministerial duty to any inhabitant, furnishing him with a written authority, under their hands, which can be exhibited to the inhabitants whom he personally notifies, and with written notices, *signed by the trustees*, to be left at the houses of those whom he may find absent from home.

3. To make out a tax list of every district tax voted by any such meeting, containing the names of all the taxable inhabitants residing in the district at the time of making out the list, and the amount of tax payable by each inhabitant set opposite to his name: In 4 Denio, 125, the supreme court held a warrant void where one of the trustees made out a tax list, and took the list and warrant to a second, who signed, but the other trustee was not consulted. In 3 Denio, 598, the court

held an assessment void which was made and signed by two assessors, the third being present in the room where it was made, but not being consulted or taking any part in the business. This fact was permitted to be shown by the evidence of one of the assessors who acted, to repel the legal presumption that all had been consulted. The decision was affirmed by the court of appeals, (1 *Comst.*, 79; *see Digest, ante, p.* 95.)

The trustees should meet for the purpose of making out a tax list within ten days after the meeting at which the tax is voted, so that if it be necessary to resort to any other evidence than the last town assessment roll for the valuation of property, or if a reduction shall be claimed, they may give twenty days' notice, and complete the tax list at the expiration of thirty days after the district meeting. It would be well for them to give notice at the district meeting of the time and place at which they will meet to make a tax list, so that any inhabitant conceiving himself entitled to a reduction may appear and be examined on oath in regard to it. The mode of proceeding in arriving at valuation and making the roll will be treated more at large in the comments upon a succeeding section. It is proper to remark here that the heading of every tax list should specify for what purposes and under what authority every sum included therein is levied. Whenever any controversy is anticipated in regard to any tax, it should be made on a separate list from others voted at the same meeting, so as not to embarrass or delay the collection of that which is undisputed.

4. To annex to such tax list a warrant, directed to the collector of the district, for the collection of the sums in such list mentioned: The form of a warrant will be given in another place. The supreme court (18 *Barb.*, 331) have stated it as "remarkable that the school laws, as they now stand, contain no provision limiting or directing the time within which the warrant shall direct the collector to collect or return the warrant." It is, however, clearly contemplated by the statute that the warrant shall mention a time within which it is to be executed, and the practice has been to fix it at thirty days, which was the period fixed by § 100, chap. 480 of 1847, prior to the amendment made by § 5, chap. 382 of 1849. It is better to conform to that practice than to fix any other period, unless in a case where it is palpable that an immediate collection is unnecessary, and the convenience of the tax payers is to be greatly promoted by a brief extension.

5. To purchase or lease a site for the district school-house, as designated by a meeting of the district, and to build, hire or purchase, keep in repair and furnish such school-house with necessary fuel and appen-

dages, out of the funds collected and paid to them for such purpose: This power is necessarily exclusive. A practice has grown up in some quarters of appointing a building committee by the district meeting to superintend the erection of a school-house. So far as a building committee act in aid of the trustees, by their advice and personal service in carrying into execution the wishes of the inhabitants, under the direction of the trustees, there is no objection. But the trustees alone have the power to bind the district by a contract, written or verbal, and the district cannot supersede them by a building committee or any other agents. (*See Digest, pp.* 17, 29 *and* 30, *ante.*) It is in the power of the inhabitants, through the agency of a committee or otherwise, to procure plans and specifications, to the minutest detail, for a school-house or other mechanical structure in contemplation. They may in district meeting select among those thus procured, and may, by the resolution authorizing the building, limit the power to making a contract according to the plan and specifications adopted. This is the only method of controlling the discretion of the trustees in the matter. It rests with the trustees to accept or reject the work, unless the inhabitants, in the vote authorizing the building, have appointed or provided for the appointing of other arbiters. This they may do by directing it to be inserted in the contract with the builder, that the sufficiency of the materials and workmanship under the contract shall be determined by persons named in the resolution, with the power to determine what sum shall be deducted as damages from the contract price, or to reject it wholly; or by nominating in the resolution an arbitrator on the part of the district, and requiring the builder to nominate another, with power to the two to choose an umpire in case of disagreement, such arbitrators to assess damages or reject the work entirely, and securing to the trustees in the latter case the right to remove the building from the site at the expense of the builder, unless he removes it himself upon notice to do so.

A stringent contract, which should in all cases be in writing, with such provisions for the summary adjustment of any questions which may arise under it, will relieve the trustees from much personal responsibility and trouble, as well as protect the district from quarrels and litigation, which in any event are disastrous.

6. To have the custody and safe keeping of the district school-house: The trustees are charged with the custody of the school-house for the purpose of public instruction; and it is their duty to exercise such a general supervision over its care and management as that the instruction of the pupils in the school shall not be embarrassed by any use of

the house other than for school purposes, and that the property of the district, and the furniture, books and papers belonging to the school or the pupils, shall not be destroyed or injured. Any use of the house in subordination to these restrictions, and not inconsistent with the main purposes for which it was designed, may be allowed by the trustees, with the general consent. (*See Digest, ante, p.* 71.) In such cases, however, it would seem to be the duty of the trustees to require such a remuneration for the use as may be sufficient to clean the rooms, and to indemnify the district against casual damage and wear. There is no good reason why the expenses of the district should not be lightened by the trifling revenue derivable from the occasional use of its house, when not wanted for school purposes, and in a manner not to interfere with them. The trustees, however, cannot make any permanent contract for the occupation of the school-house. They can simply give a license, revocable at their own discretion, which they cannot by contract foreclose themselves from exercising as the public good may require at any moment. Strictly speaking, they can grant no *right* to use the district property for any other than educational purposes; they can only by their acquiescence estop themselves from bringing an action for the act of entering the school-house, which would otherwise be a trespass. Nothing should be tolerated which may give occasion to a controversy among the inhabitants.

As the custody of the building is vested in all the trustees, all have the right of visiting and inspecting it at all times, and a majority of the trustees cannot exclude the third.

7. To contract with and employ all teachers in the districts: The power to contract for the district is a power to contract with such teachers only as the law authorizes the inhabitants to expect, teachers to the payment of whose wages public money may be applied in reduction of their rate bills, that is, teachers possessing, at the time of making the contract, a regular and valid certificate of qualification. The inhabitants have no power to engage nor to discharge a teacher. (*Digest, p.* 38.) No one of them can demand from the teacher as a matter of right that the latter should exhibit his certificate. He has no means of knowing, when sending his children to school, whether he subjects himself to a rate bill for the whole cost of tuition, or whether it is to be defrayed in part by public money, except in the fact that the trustees are his agents for the purpose of employing qualified teachers and none others. It is a fraud upon the inhabitants to engage a teacher not then possessing a certificate, without express notice to them that until he

shall obtain one the school is to be in effect a *private* school. It is difficult to find any principle upon which the trustees can be authorized, by levying a rate bill, or any other *official* action, to provide for the payment of such a teacher. A public officer, to justify the execution of a statutory power, like that of issuing a warrant to levy upon the property of a citizen, is bound to prove that he has strictly pursued all the steps preliminary to the vesting of the power. The ministerial officer who executes the warrant is indeed protected by another rule, for if it is regular on its face he is not to inquire whether it may not be impeached by extrinsic facts. The question has not been passed upon by the courts, and it may be premature to say what influence the toleration hitherto of the collection of rate bills for the wages of unqualified teachers may have upon their decision when it shall be presented. In the mean time the only mode for trustees to secure themselves against a dangerous personal responsibility is to meet as a board (*Digest, p.* 93) and insist upon the actual production of a certificate before contracting with a teacher.

A practice has prevailed to a very considerable extent of trustees engaging with a teacher that he shall board with the parents of the children alternately. There is no authority for such a contract, and it cannot be enforced on the inhabitants. This compulsory boarding gives occasion to constant altercation and complaint, which often terminates in breaking up the school. The best arrangement is to give the teacher a specific sum and let him board himself. But there are some districts so destitute that it may afford the inhabitants considerable relief to be permitted to board the teacher. In such cases the object can be obtained in another way. Let the trustees contract with the teacher at a specific sum per week or month, and they may then agree with him that if he shall be afforded satisfactory board at the house of any of the inhabitants, he will allow whatever sum may be agreed on per week for such board, to be applied to his wages, and will give an order on the trustees for the amount to the person with whom he boards; and the trustees may then accept such order from the inhabitants, as payment to that extent upon his tuition bill, and deduct it from the amount to be paid the teacher, after having paid him the whole of the public money.

The amount of the compensation to be paid to teachers is within the discretion of the trustees exclusively. The inhabitants have no power to control them in this respect, or in the selection of the individuals to be employed, though the trustees would act most unwisely in disregarding their preferences and wishes, when reasonable and just. There is

little danger that they will abuse their discretion in making the compensation too high. The wages of teachers are generally quite inadequate, those of females scandalously so. It is a reproach to our civilization that a woman should earn less as a teacher than she might in a cotton mill or as a dressmaker, especially as the qualities of her sex admirably adapt her for the instruction of the young. Trustees may be very certain that in purchasing the services of a teacher, as in every other business transaction, the way to get a good article is to offer a fair price, and that the most wretched economy in the world is to employ a poor teacher. They would grudge no price to secure a skillful physician to restore the bodily health and vigor of their own children. They would never commit a watch to a bungler, because he offered to tinker at it for slender pay; what right have they to deal more stingily in selecting and paying the person who is to deal with an organization so much more delicate and intricate than a watch, as the minds and souls of the children of an entire community, and through whose ignorance or error they may imbibe poison instead of nutriment or medicine?

The following is suggested as a proper form for a contract to be drawn up in duplicate, one copy to be filed with the district clerk, the other retained by the teacher, viz:

A. B., having produced to the trustees of District No. , in the town of , a certificate (or diploma of Normal School) found in due form to license him to teach a common school in said district (as first assistant or in the primary department, as the case may be, if the certificate is limited), is hereby engaged for the term of weeks, provided his certificate shall so long continue in force, to instruct the school of said district hours in each day, exclusive of Sundays and customary holidays, and except that on Saturdays he is to teach but hours, for the wages of dollars per week, (whereof per week is to be paid by the boarding of said teacher in the families of such inhabitants as shall be from time to time designated by the trustees and shall be satisfactory to said teacher.)

The said A. B. faithfully performing his duties as such teacher, the trustees engage to exercise their legal powers in providing for the payment of his wages aforesaid, by giving him orders on the supervisor (monthly, or as may be agreed) to the amount of , (so much of the public money appropriated to the term as may be apportioned to the teacher upon a fair division thereof among all the teachers employed at the same time) for his whole term of service, and in proportion for a less time, and at the expiration of the term, upon being furnished by

said teacher with entries of the number of days which the scholars attending school shall have respectively attended, verified by his oath, to make out the necessary rate bills and tax lists for the collection of the residue of his wages.

Where a teacher was employed by one of the trustees only, after consulting the others separately, and all three of the trustees sent children to the school, as did the district generally, it was held by the supreme court (15 *Barb.*, 323) that having performed the agreement on her part she was entitled to recover the compensation, on the ground the action being brought on an *executed* contract, "that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract. * * Where the contract is still executory, and nothing has been done under it, and the action is to recover damages merely for non-performance, it is for the plaintiff to show a legal contract, binding upon the corporation. But this is not that case."

This is sufficient for the teacher while the consent lasts; but the difficulty in respect to the trustees is, that those who have given their consent in this irregular manner may revoke it and leave the one who made the contract personally liable to damages, without any claim to be indemnified by the district. (*Digest, pp.* 80, 82, 93 *ante.*)

A teacher once employed cannot be dismissed, without some violation of the contract on his part, during the time for which it was to continue. (*Digest, pp.* 10, 15, 36, *ante.*) A teacher who is so unfortunate as to fail to give satisfaction to the inhabitants is still entitled to retain his place, unless it is forfeited by positive misconduct such as amounts to a breach of the contract, or would justify the annulling of his certificate. As to the remedy where the inhabitants withdraw their children from school without reasonable cause, see Digest, *ante*, p. 47. It must be a very clear case to authorize the application of so large a portion of the public money as in that instance to a single term. Difficulties of this kind very seldom arise, except in consequence of a want of harmony among the trustees, or a wanton disregard by them of the wishes of their constituents.

As to the employment of a trustee as teacher, see Digest, p. 99. The objections there stated have considerable force in reference to the employment of any near relative of a trustee.

8. To pay the wages of such teachers, when qualified, by giving them orders on the [supervisor] for the public money belonging to their district, so far as such moneys shall be sufficient for that purpose; and to collect the residue of such wages from all persons liable therefor: It will be observed that this power is confined in express terms to the payment of *qualified* teachers. To pay public money to any other is a misapplication of it, which renders the trustees personally liable to repay the amount. (*Com. School Dec.*, 213.) The public money apportioned for the year is to be exhausted in paying the teachers for services rendered *during that year.* (*Digest, p.* 48.) The year ends with the 31st of December, which is ordinarily in the middle of a term, and the whole of the public money of the year should be earned, and orders for it drawn, on or before that day. If it be exhausted previous to the commencement of the winter term, then an amount equal to the wages for so much of that term as precedes the first of January must be provided by rate bill or other resources than the public money. The rate bill, however, is to be predicated upon the attendance during the whole term, and not merely upon that previous to January 1st. (*Com. School Dec.*, 232.)

The public money apportioned for teachers' wages can be applied to no other purpose whatever, and therefore an order drawn upon the supervisor should show upon its face that it is in compliance with the statute. The form may be as follows:

To J. D., supervisor of the town of :

Pay to A. B., or order, dollars cents, on account of wages earned by him when duly qualified as a teacher in District No. , in said town, between the day of September and the 25th December, 1856. Dated Dec. 27, 1856.

E. F., C. D., G. H., } *Trustees, Dist. No.* .

The wages of a teacher include the whole compensation allowed him for board, lodging or any other object. In drawing an order or a rate bill, any sum allowed for board, &c., should be denominated wages. The order can be drawn only in favor of the teacher. If he desires to apply the proceeds to the payment of a private debt for board or other consideration, he can endorse it to his creditor, but it is for him and not for the trustees to distribute his wages. (*Digest, ante, p.* 3.)

A teacher should be paid promptly. It is often a considerable hardship for him to wait for the collection of a rate bill, and when he has furnished a properly attested attendance list there can be no risk in the trustees advancing the money due him. (*Digest, p.* 105.)

9. To divide the public moneys received by them, whenever authorized by a vote of their district, into not exceeding two portions for each year; to assign and apply one of such portions to each term during which a school shall be kept in such district, for the payment of teachers' wages during such term, and to collect the residue of such wages not paid by the proportion of public money allotted for that purpose from the persons liable therefor, as above provided: Where the inhabitants have not made a division of the public money by resolution, the trustees have the power to make such division as they deem just and expedient. (*Digest, ante, pp.* 17, 48, 85.) There is a manifest propriety in determining what proportion of the public money shall be applied to a term, before the term begins, so that each inhabitant sending pupils to the school may know the extent of the liability to which he subjects himself to be assessed upon a rate bill.

There are some difficulties inseparable from the fact that the statute recognizes but two terms in a year, while in practice there is one summer term and parts of two winter terms. The increase of the public money to be distributed under the act of 1856 will render them more embarrassing. Perhaps the best method of obviating these will be to procure a vote of the inhabitants in district meeting, assigning a portion of the public money to each term; for example, one-third to the winter and one-third to the summer term, and leaving the residue to be applied by the trustees in their discretion.

Strictly speaking, the only public moneys received by the trustees are those derived from the income of local funds, the tuition bills of non-residents, and other sources than the state treasury. All such moneys applicable to the payment of teachers' wages for the term are, by § 6, chap. 151 of 1851, required to be first applied before the balance to be raised by rate bill is ascertained.

10. To exempt from the payment of the wages of teachers, either in part or wholly, such indigent persons within the district as they shall think proper, in any one quarter or term, and the same shall be a charge upon such district: The power of exemption under this clause is confined to indigent inhabitants of the district. It is to be exercised at the time of making out the rate bill for the term, and is operative only for that term. The trustees must, before issuing their warrant, deter-

mine who are proper persons to be exempted. They have not the right to suspend the determination until the indigence of the party has been demonstrated by an unavailing effort to collect a rate bill by distraining his property. For such cases the law has made a different provision.

In the exercise of this power the utmost liberality compatible with justice to the district should be indulged. (*Digest, ante, p.* 31.) It is the right of every child to attend the district school, and no parent should be permitted to withhold him, either from doubt of his ability to meet a rate bill without inconvenience or from that pardonable pride of feeling which makes it humiliating to ask an exemption. The exemption is provided, not in the interest of the parent, but because the interest of the *state* requires that his children should be educated. It is for the trustees to seek them out and solicit their attendance. Whenever they have reason to suspect that parents will refrain from sending them, from apprehension of a rate bill, they would better promote the objects of their appointment by removing this apprehension, and that in such a manner as not to wound the sensibilities of the parent by treating him as an object of charity, than by permitting the places of the children in the school to remain vacant. It is not to be forgotten that the poor, in giving up the time and personal services of their children, and providing them with food and clothing while receiving instruction, make a contribution which is often larger, in proportion to their means, than the heaviest rate bill to a man in easy circumstances. Besides, suppose the parent is actuated by criminal penuriousness, the child deserves none the less to be protected from suffering on this account, and the state is not the less injured by his growing up an ignorant and therefore an unprofitable member of society.

11. To certify such exemptions and deliver the certificate thereof to the clerk of the district to be kept on file in his office: Not merely the fact, but the amount of the exemption in each case should be stated in the certificate, as the amount of such exemptions becomes a charge upon the district, and the certificate is the evidence of the trustees' authority to make out a tax list for the aggregate of such amounts. The following is a proper form:

The undersigned, trustees of District No. , in the town of , hereby certify that at a meeting for that purpose, at which all were present (*or* at which A. B., having been duly notified, failed to attend), the following persons were exempted from the payment of teachers' wages,

for the term ending on the day of , to the amounts set opposite to their respective names, viz:

Names.	Amount of exemptions.
Peter Barney,	$0 50
Thomas Jones,	2 60
John Radcliff,	1 84

Dated this day of , 1857.

A. B.,
C. D., } *Trustees.*
E. F.,

12. To ascertain, by examination of the school list kept by such teachers, the number of days for which each person not so exempted shall be liable to pay for instruction, and the amount payable by each person: The assessment to be made under this clause is for the purpose of making out a rate bill, and therefore relates only to *inhabitants* of the district. (*Digest, ante, p.* 101.) The school lists may include other persons, who have contributed or are bound to contribute to the funds of the district by the payment of tuition bills. The amount of such contributions may or may not be graduated by the number of days' attendance, according to the contract made by the trustees for admitting them to the school. But as the rate bill is to be made out only for the balance required to pay teachers' wages, after applying the public moneys belonging to the district, and must be made out in proportion to the number of days and of children sent, and as non-residents have no interest in those public moneys, their dues for tuition are to be ascertained and collected otherwise than by rate bill.

The method of making the assessment is first to add together the number of days and half days' attendance (reckoning two half days as one day) by each child belonging to the family of an inhabitant, or for whos tuition an inhabitant of the district has made himself responsible. Thus, if one inhabitant has sent four children for 104 days, he will be charged for 416 days, and so on. Suppose, upon adding up the whole number of days thus ascertained, the total is found to be 4,000 for the average attendance of 40 scholars for the whole term, and that the amount due to the teachers, after applying the proportion of public money allotted to the term, local funds and tuition bills of non-residents applicable to teachers' wages, is $40; the proportion of $40 due for one scholar for each day would be one cent; and this multiplied by the number of days each scholar attended would give his pro-

portion; and by adding the proportions of each belonging to the same family, the amount due from each person sending to school is ascertained. Some of these may be exempted under the previous clauses, and the aggregate of the amounts for which they are exempted is to be raised by *tax* on the property of the district. Those remaining, with the amounts found due from them respectively, are to be inserted in the rate bill.

All the children of inhabitants attending the district school during the same term must be charged at the same rate per day for tuition, without regard to the studies they may pursue, or to the department, room or school-house in which they may attend, or to the fact that the teachers employed in their instruction may receive very different rates of compensation, or that one teacher may have been employed for one portion of the term and one or more others for the remainder. There is to be no discrimination in the rate bill except that resulting from the number of days and of children sent. (*Com. School Dec., p.* 208.) This rule does not apply to non-residents, who may be charged in proportion to the cost of the instruction furnished them, as they would be at a private school.

Nor does it apply where, after the close of the term, the same teacher continues without any intermission, in consequence of a prolongation of the period for which he was originally engaged. (*See Digest, ante, p.* 52.) The limits of a term should be fixed in advance, so that the inhabitants may know the extent of their responsibility.

Difficulties sometimes arise in respect to the liability of inhabitants for the tuition of persons in their employment or under their protection. The general rule is, that every head of a household must be supposed to direct the conduct of its members, and that he voluntarily assumes the legal responsibility growing out of their attendance upon a school. This presumption, however, does not always apply. Thus, where a person had from charitable motives taken a poor family to reside with him in his house, the children of which attended the district school, it was held that he was not liable for the tuition of such indigent children, unless they were sent to school by him under an express or implied contract to be responsible for such tuition; and that if sent by their parents, or if they attended school of their own accord, the trustees should exempt the parents from payment of the tuition bill. (*Per Spencer, Supt.*, 1840.)

A grandfather is not *prima facie* liable for the board or schooling of a grandchild. He may, however, *become* liable, in the same manner and to the same extent as any individual who has a youth residing with him

whom he supports, and suffers to go to school without giving any particular directions on the subject. An implication would arise that it was by his assent. But the father or mother is *prima facie* liable; and some positive acts on the part of the grandfather must be shown, amounting to an assumption of liability on his part, before he can be held responsible for the payment of tuition under such circumstances. (*Per Spencer, Supt.*, 1841; *see also Digest, p.* 45.)

In ascertaining the amount payable by each person, the question is often mooted whether the tuition bills of the children for whom he is charged are to be reduced by the application of public money. The statute in this particular is to be liberally construed. It secures the freedom of the schools, so far as the public money will make them free, to all persons over five and under twenty-one years of age residing in the district, and to all children included in the reports of the trustees. It directs them to enumerate in their reports all children who shall "at the date of such report actually be in the district, composing a part of the family of their parents, guardians or employers." It recognizes, therefore, a *temporary* residence for the sake of employment, such as would not constitute the child an *inhabitant* in the ordinary legal sense of the term, as entitling him or her to the full benefits of free education. The question ordinarily turns upon the point whether the residence is in good faith, or whether it is merely colorable with a view to resort to a school in another district than that in which he would have otherwise remained a resident. (*See Digest, p.* 91.)

13. To make out a rate bill containing the name of each person so liable, and the amount for which he is liable; and to annex thereto a warrant for the collection thereof:

Form of rate bill and warrant.

Rate bill, containing the name of each inhabitant not exempted and liable for the payment of teachers' wages in District No. , in the town of Trenton, county of Oneida, for the term ending on the day of , 185 , and the amount for which he is liable.

NAMES OF INHABITANTS SENDING TO SCHOOL.	Whole number of days sent.	Amount for which he is liable.	
John Jackson,.....	104	$1 04	
James Johnson,.....	416	4 16	
Timothy Warner,.....	312	3 12	
Solomon Kinney,.....	54	0 54	
William Jones,.....	416	4 16	
John Dye,.....	104	1 04	
William Johnson,.....	104	0 04	paid $1 to teacher.
Thomas Jones,.....	520	2 60	
John Radcliff,.....	520	2 60	
James Tunicliff,.....	520	5 20	
John Simon,.....	520	5 20	
Joseph Williams,.....	360	3 60	
	3,950	$33 30	

To the collector of School District No. , in the town of Trenton, in the county of Oneida:

You are hereby commanded to collect, from each of the persons in the annexed rate bill named, the several sums mentioned in the last column thereof, with one per cent on all such sums as may be voluntarily paid to you within two weeks after the receipt of this warrant, and with five per cent on all sums collected by you after the expiration of that time, for your fees, and within thirty days after receiving this warrant to pay the amount so collected by you into the hands of the trustees of said district, or one of them; and in case any person therein named shall neglect or refuse to pay the amount set opposite his name as aforesaid, you are to levy the same by distress and sale of the goods and chattels of such person, except such as are exempt by section twenty-two, article two, title five, chapter six, part three of the Revised Statutes from levy and sale under execution.

Given under our hands, this day of , in the year of our Lord, one thousand eight hundred and .

A. B.,
C. D., } *Trustees.*
E. F.,

The statute does not require the insertion in the rate bill of the number of days for which the inhabitants are charged, and the first column might therefore be omitted without vitiating the warrant. The second column should contain the sum for which each inhabitant *remains* liable at the time the warrant is issued, after deducting any payment which he may have made to the trustees or teacher. In case of such a partial payment having been made it may be explained in the margin. For statement of the property exempt from levy under the warrant to collect a rate bill, see p. 211, *ante.*

14. To deliver such rate bill, with the warrant annexed, after the same shall have been made out and signed by them, to the collector of the district, who shall execute the same in like manner with other warrants directed by such trustees to such collector for the collection of district taxes; and the collector to whom any such rate bill and warrant shall be delivered for collection shall possess the same power, be entitled to the same fees, and subject to the same restrictions and liabilities, with their bail and sureties, as by this title is provided in proceedings to collect school district taxes: The collector is under no legal obligation to give notice that the rate bill is in his hands, for the purpose of receiving voluntary payments; a provision to that effect, formerly contained in the statute of 1847, having been omitted in the subsequent amendments. It would, however, be commendable in him to post a notice as soon as he receives the warrant.

It will be seen by *No.* 113, *post*, that the warrant for the collection of a rate bill is to be executed in a *different* manner than that for a tax in this respect, viz: That certain property is exempt from levy for a rate bill which is not exempt from levy and sale for a tax. The language of the above clause has, however, been left unchanged in the text, with this explanation.

Previous to 1847 the statute contained an express provision requiring the collector to execute a bond for the faithful execution of the duties of his office, and making his office vacant upon his omission to execute such bond for ten days after being required by the trustees to do so This provision was dropped in the revision of 1847, and the trustees

have no power to demand a bond from the collector. In case of his embezzlement of moneys collected, he may be removed from office by the State Superintendent; and the inhabitants, by the election of a faithless officer, render themselves liable to a new assessment to pay a second time taxes and rate bills which have been once collected. A bond voluntarily executed by the collector and his sureties would doubtless be valid.

No. 112. Any balance required to be raised in any school district for the payment of teachers' wages beyond the amount apportioned to such district by the previous provisions of this act, and other public moneys belonging to the district applicable to the payment of teachers' wages, shall be raised by rate bill, to be made out by the trustees against those sending to school in proportion to the number of days and of children sent, to be ascertained by the teacher's list; and in making out such rate bill, it shall be the duty of the trustees to exempt, either wholly or in part, as they may deem expedient, such indigent inhabitants as may, in their judgment, be entitled to such exemption, and the amount of such exemption shall be added to the first tax list thereafter to be made out by the trustees for district purposes, or shall be separately levied by them, as they shall deem most expedient. (*Sec.* 6, *chap.* 151 *of* 1851.)

No. 113. The same property which is exempt, by section twenty-two of article two, title five, chapter six, part three of the Revised Statutes, from levy and sale under execution, shall be exempt from levy and sale under any warrant to collect any rate bill for wages of teachers of common schools. (*Sec.* 7, *chap.* 151 *of* 1851.)

The articles exempted under this section will be found enumerated on page 211, *ante.*

No. 114. The trustees of any school district may expend in the repair of the school-house a sum not exceeding ten dollars in any one year, and the same may be levied and collected by a separate tax, or added to any tax authorized to be levied and collected. (*Sec.* 9, *chap.* 382 *of* 1849.)

The power to make repairs to the extent of ten dollars in each year, and to collect the amount by tax, is independent of any vote of the

district. There are very few school-houses which do not annually require repairs costing at least ten dollars, to maintain them in such a condition as the comfort and health of the pupils demand. The trustees should never permit any necessary repairs to remain undone a day longer than they can be executed without dismissing the school, nor should they hesitate to dismiss the school for a day or two when the repairs cannot be postponed without exposing the inmates to discomfort. It is not necessary that the whole of the ten dollars should be collected at one time or by one tax. When any sum for repairs is added to another tax, the fact should be distinctly stated in the heading of the tax list, and the amount specified.

No. 115. When the necessary fuel for the school of any district shall not be provided, by means of a tax on the inhabitants of the district or otherwise, it shall be the duty of the trustees of the district to provide the necessary fuel, and levy a tax upon the inhabitants of the district to pay for the same. (*Sec.* 7, *chap.* 382 *of* 1849.)

This section was substituted by the legislature in the place of the provisions of the act of 1847, which authorized the trustees to require the inhabitants to furnish fuel in proportion to the number of children sent by each. They have no longer any authority to require inhabitants to furnish fuel, nor can it be given to them by a vote of the district. The only authority given to the district meeting upon the subject is to levy a *tax* upon the property of the taxable inhabitants, not a rate bill upon those sending to school to furnish the house with fuel. It is only by a voluntary arrangement that fuel can be otherwise provided.

If wood be furnished by the inhabitants, or some of them, under such an arrangement, they may be credited upon the tax list with its price, as agreed upon between the party furnishing it and the trustees. If the fuel be not supplied in this manner, or if the quantity provided by a tax voted by the district meeting be insufficient, it is the duty of the trustees to purchase what is necessary. The word "fuel" imports wood or other material in a state fit for use. It is not the duty of the teacher or of the pupils to cut or split or in any way to prepare the materials for use. The trustees, therefore, should require the wood to be adapted to the fire-place or stove, and should make the tax large enough to furnish a supply of fuel, sawed or cut into suitable lengths, split and piled in the wood-house.

No. 116. It shall be the duty of the trustees of school districts to procure, for the use of their district, two bound blank books, from time to time, as shall be necessary, in one of which the accounts of all moneys received and paid by the trustees, and a statement of all movable property belonging to the district, shall be entered at large, and signed by such trustees, at or before each annual meeting in such district; in the other of the said books the teachers shall enter the names of the scholars attending school, and the number of days they shall have respectively attended, and also the days on which such school shall have been inspected by the [school commissioner]; which entries shall be verified by the oath or affirmation of the teachers. The said books shall be preserved by the trustees as the property of the district, and shall be delivered to their successors. [*Sec.* 104, *chap.* 480 *of* 1847.]

The account to be entered by the trustees should specify every sum of money received by them, or any one of them, in his official capacity, from the supervisor, or on tax lists or rate bills, giving the date when and the source whence received. On the opposite page they should credit themselves with every expenditure and payment, specifying particularly when, and to whom paid, and for what purpose, and referring to a proper voucher, which should be filed and delivered to their successors.

On another page they should make an accurate inventory of all the movable property belonging to the district, such as the library of the district, stating the number of volumes and their condition, and giving a catalogue of the books, wherever a general reference cannot properly be made, as to the 1st, 2d, 3d, &c., series of the Harper Library, or Nos. 1, 2, 3, &c., of the Harper Library or Family Library, &c., &c., and the furniture, appendages and apparatus of the school room, specifying each article. The whole to be followed by a certificate in the following form:

We, the subscribers, trustees of District No. , in the town of *Trenton*, do hereby certify that the preceding, from page to page , inclusive, contains a true and accurate account of all the moneys received by us for the use of said district, and of the expenditures thereof, and a correct statement and inventory of all the movable property belonging to said district.

Dated this day of , 18 .

A. B.,
C. D., } *Trustees.*
E. F.,

The teacher's list, to be kept in the second book named, is the basis upon which rate bills are made out, and by which the sums to be paid by parents are to be ascertained. Among the first duties of the trustees will be that of placing the book in the hands of the teacher, and directing him to keep the list daily, and accurately.

The teacher will write the name of each scholar on the list, the first day he enters school, and note his attendance every day during the term. The trustees should inform him that unless the roll is correctly and faithfully kept, and handed to them duly verified at the close of the school, he will not be entitled to call on them for his wages; for his list, so verified, is the only legal authority upon which to issue their warrant.

The roll may be in the following form:

DAILY AND WEEKLY ROLL.

ATTENDANCE OF PUPILS IN THE DISTRICT SCHOOL OF DISTRICT NO.

Date.	PUPILS' NAMES.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	1st w'k	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	2d w'k	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	3d w'k	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	4th w'k	Monday.	Tuesday.	Wedoesday.	Thursday.	Friday.	Saturday.	5th w'k
Nov. 1, 1856.	John Thompson,	1	1	½	1	1	½	5	...	1	1	1	1	...	4	1	1	1	1	1	½	5½	1	1	1	1	1	½	5½	1	1	1	1	1	½	5½
" 8, "	Mary Jones, ...	...	...	...	..	...	...	....	1	1	1	1	1	½	5½	1	1	1	1	1	½	5½	1	1	1	1	1	½	5½	1	1	1	1	1	½	5½
" 16, "	V. M. Rice, Jr.,	...	...	...	...	...	...	....	...	...	...	...	...	...	....	...	1	1	1	1	½	4½	1	1	1	1	1	½	5½	1	1	1	...	1	½	4½

Ruled and kept in this manner, each page will serve for a month, or whole term. When the teacher is furnished with a blank book not ruled, he should rule it with care, and he may find it convenient to extend the ruling so that each page will contain blanks for as many days and weeks as there shall be in the term for which he is employed.

At the close of the term, a list should be made out by the teacher, containing the names of all the pupils, with the date of their entrance, and the number of days' attendance in full, as follows, viz:

A list of the scholars who attended the district school of District No. , in the town of , during the quarter or term commencing the day of , 185 , and ending the day of , and the number of days they respectively attended the same.

Time of Entrance.	Names of Scholars.	No. of Days' Attendance.
Nov. 1, 1856.	John Thompson, ...	Twenty-five and half (25½) days.
" 8, "	Mary Jones, ...	Twenty-two (22) days.
" 16, "	V. M. Rice, Jr., ...	Fourteen and half (14½) days.

This list should be made by inserting the name of the pupil the first day of his entrance; and the whole number of days' attendance may be inserted, at the close of the term, from the daily and weekly roll.

At the end of this list, the following oath or affirmation should be written:

A. B., being duly sworn (or affirmed), deposes that the foregoing is a true and accurate list of the names of the scholars who attended the district school of District No. , in the town of , during the quarter (or term) commencing the day of , and ending

the day of , and the number of days they respectively attended.

A. B.

Sworn before me, this day of , 185 .

C. D., *Justice of the Peace.*

This affidavit, or affirmation, may be certified by a justice of the peace, or commissioner of deeds, judge of any court of record, county clerk or school commissioner to have been taken before him.

An abstract of the list must also be made by the teacher for the use of the trustees, at the end of each term, showing the results exhibited under the following heads, in the following form:

Abstract of the attendance of scholars at the district school of District No. , in the town of , during the term commencing the day of , 185 , and ending the day of

Of scholars who attended one month and less than two months,
" " " " two months and less than four "
" " " " four months and less than six "
" " " " six months and less than eight "
" " " " eight months and less than ten "
" " " " ten months and less than twelve "
" " " " twelve months,

The teacher should sign this abstract and deliver it to the trustees.

As few terms of any common school will be longer than six months, the above form extends beyond what most teachers will require. At the close of the year, the trustees will add together and condense these term abstracts into one, for the whole year; and then the form beyond six months, and up to twelve, may be used. In adding up the term abstracts, if John Thompson's name appears on two or more terms, his whole time must be stated in the yearly abstract of the trustees. That is, if John Thompson attend, during the first term, two months, during the second term, three months, during the third term, four months, he must be computed among the scholars enumerated on the line "eight months and less than ten." Care should be taken not to enumerate the same scholar more than once in the abstract for the year.

It should be borne in mind that the teacher cannot be required to buy the lists, and the book for his daily and weekly roll and for the final summary roll for the term. It is the duty of the trustees to furnish

them. If they do not, then the trustees cannot demand the list from the teacher, and will be personally responsible to him for his wages.

Hence the trustees have a direct personal interest in providing the lists and the book, and the teacher in keeping them.

No. 117. When the trustees of any school district are required or authorized by law, or by a vote of their district, to incur any expense for such district, and when any expenses incurred by them are made by express provision of law a charge upon such district, they may raise the amount thereof by tax in the same manner as if the definite sum to be raised had been voted by a district meeting, and the same shall be collected and paid over in the same manner. (*Sec.* 109, *chap.* 480 *of* 1847.)

This provision first came into force as section 14, chap. 260 of 1841. The supreme court, commenting upon it, in 4 Denio, 298, says: "It is said that the statute ought to be so construed as to confine its operations to small incidental expenses incurred by the trustees. But the language is general, and there is nothing which, upon any just principle of interpretation, will warrant us in restricting the provisions to any particular class of expenses." That case was one in which the district had voted to build a school-house, and the materials and dimensions specified were such as to have the effect of bringing the cost within $400, and it was held that "if the district had left the *whole* within the discretion of the trustees, and they had kept within the four hundred dollars, the act of 1841 would have authorized them to levy the tax." The object of this section, however, is simply to dispense with the necessity of fixing a *definite amount* to authorize the levying of a tax, and it has not the effect of permitting the trustees to levy a tax, under the vote of a district for expenses incurred for any *purpose* for which the law has not conferred the power upon the inhabitants of voting a definite tax. If the inhabitants cannot lay the tax directly, they cannot effect the same object by directing the trustees to expend money or to do acts involving the expenditure of money.

Among the expenses made by express provision of law a charge upon the district, and which the trustees are authorized to incur without any vote of their district, is that of hiring temporarily any room or rooms for the keeping of schools therein, whenever it shall be necessary for the accommodation of the children. (*See No.* 148, *post.*)

It is believed that a tax list, for any expense incurred under this section, may be separate, or the amount may be included in any other tax list necessary to be made out at the time when the amount of such expenses shall have been ascertained. It is, however, the duty of the trustees, when practicable, to ascertain the definite amount, and to make out the tax list therefor within thirty days after the meeting at which the expenditure may have been authorized. When any tax under this section is included in the same tax list with others, the heading should distinctly specify the amount, the object and the authority; as by saying, for example: "Also, twelve dollars for the expense of temporarily hiring rooms for the keeping of schools therein, necessary for the accommodation of the children in said district, from the 1st day of May to the 1st day of August, 1857; also, eight dollars and ninety-three cents for the expenses incurred in grading and draining the site of the school-house, under the resolution of a district meeting held April 12, 1857."

OF THE ASSESSMENT AND COLLECTION OF DISTRICT TAXES.

No. 118. In making out a tax list, the trustees of school districts shall apportion the same on all taxable inhabitants of the district, or corporations holding property therein, according to the valuation of the taxable property which shall be owned or possessed by them at the time of making out such list within such district, or partly within such district and partly in an adjoining district, and upon all real estate lying within the boundaries of such district, the owners of which shall be non-residents, and which shall be liable to taxation for town or county purposes, and shall be situated within three miles of the site of the school-house in such district. But when it shall be ascertained that the proportion of any tax upon any lot, tract or parcel not occupied by any inhabitant would not amount to fifty cents, the trustees, in their discretion, may omit such lot, tract or parcel from the tax list. (*Sec.* 85, *chap.* 480 *of* 1847.)

The statute requires the trustees to ascertain and determine who are taxable inhabitants *at the time of making out the tax list*, and to apportion the tax on the persons and corporations then holding property in the district, without regard to the time when the same was voted, and

without discrimination on account of the purpose for which it was voted, except that in favor of any inhabitants under No. 132, *post.* (*See Digest, ante, p.* 39.)

The personal property of all persons actually residing in the district is taxable therein, wherever such personal property may be situated. It is also provided, by chap. 37 of 1855, that "all persons and associations doing business in the State of New-York, as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong."

Non-residents, taxable under the above cited statute, are to be deemed taxable inhabitants of the district in which they may be doing business. If the owners or their agents become temporary sojourners in the state, for the purpose of managing such business, their residence for the purpose of such taxation is defined in the following statute:

"§ 5. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property, so held under either of these trusts, be assessed against any other person, and in case any person, possessed of such personal estate, shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted, but the products of any state of the United States, consigned to agents in any town or ward of this state, for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agent, nor shall such agents or moneyed corporations or capitalists be liable to taxation under this section, for any moneys in their possession or under their control transmitted to them for the purposes of investment or otherwise." (*Sec.* 5, *title* 2, *chap.* 13, *part* 1*st Revised Statutes, as amended by sec.* 2, *chap.* 176 *of* 1851.)

The Revised Statutes "of the assessment and collection of taxes," in title 1 of the same chapter from which the preceding quotation is taken, contain the following provisions:

"§ 2. The term 'land,' as used in this chapter, shall be construed to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the state; and the terms 'real estate' and 'real

property,' whenever they occur in this chapter, shall be construed as having the same meaning as the term 'land' thus defined.

"§ 3. The terms 'personal estate' and 'personal property,' whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

"§ 4. The following property shall be exempt from taxation:

"1. All property, real or personal, exempted from taxation by the constitution of this state or under the constitution of the United States;

"2. All lands belonging to this state or the United States;

"3. Every building erected for the use of a college, incorporated academy or other seminary of learning; every building for public worship, every school-house, court-house and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them;

"4. Every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and personal property belonging to or connected with the same;

"5. The real and personal property of every public library;

"6. All stocks owned by the state or by literary or charitable institutions;

"7. The personal estate of every incorporated company not made liable to taxation on its capital in the fourth title of this chapter;

"8. The personal property of every minister of the gospel, or priest, of any denomination; and the real estate of such minister, or priest, when occupied by him, provided such real and personal estate do not exceed in value one thousand five hundred dollars; and

"9. All property exempted by law from execution.

"§ 5. If the real and personal estate, or either of them, of any minister or priest exceed the value of one thousand five hundred dollars, that sum shall be deducted from the valuation of his property, and the residue shall be liable to taxation.

"§ 6. Lands sold by the state, though not granted or conveyed, shall be assessed in the same manner as if actually conveyed.

"§ 7. The owner or holder of stock in any incorporated company, liable to taxation on its capital shall not be taxed as an individual for such stock."

It is also provided by § 5, chap. 546 of 1855, that "toll-houses and other fixtures, and all property belonging to any plank or turnpike road company, shall be exempt from assessment and taxation for any purpose whatever, until the surplus annual receipts of tolls on their respective roads, over necessary repairs, and a suitable reserve fund for repairs and relaying of plank, shall exceed seven per cent per annum on the first

cost of such road. In case of any disagreement between the assessors of any town, village or city and any such company concerning such exemption claimed, said company may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to the appealing party of such appeal, examine the books and vouchers of such company, and take such further proofs as he shall deem proper, and shall decide whether such company is liable to taxation under the section, and his decision shall be final." (*Session Laws of* 1855, *p.* 1044.)

Subsequent statutes have added to the enumeration of personal property above given, the rents reserved on certain leases and certain debts due to non-residents of the United States, as follows:

"§ 1. It shall be the duty of the assessors of each town and ward, while engaged in ascertaining the taxable property therein, by diligent inquiry to ascertain the amount of rents reserved in any leases in fee, or for one or more lives, or for a term of years exceeding twenty-one years, and chargeable upon lands within such town or ward, which rents shall be assessed, to the person or persons entitled to receive the same, as personal estate, which it is hereby declared to be for the purpose of taxation under this act, at a principal sum, the interest of which at the legal rate per annum shall produce a sum equal to such annual rents; and in case such rents are payable in any other thing except money, the value of such annual rents in money shall be ascertained by the assessors, and the same shall be assessed in manner aforesaid. (*Laws of* 1846, *chap.* 327, § 1, *p.* 466.)

"§ 2. The board of supervisors in each county shall assess the taxes, to be raised for town, county and state purposes, upon the person or persons entitled to receive such rents, within the town or ward where the lands upon which such rents are reserved and situated, in the same manner and to the same extent as any personal estate of the inhabitants of such town." (*Same chap.*, § 2, *p.* 467.)

Under this statute it has been decided (4 *Barb.*, 12) that "The tax is to be assessed in the town where the lands lie. In this respect it is like a tax on real estate, and not like that on personal estate, which follows the residence of the person whose property is assessed." In that case it was held that the valuation of the assessors might be corrected by the affidavit of the person assessed, and, as was also held in 7 Barb., 251, that all leases are included within the act which originally had more than twenty-one years to run, notwithstanding the term remaining unexpired at the time the assessment is made may be less than twenty-one years; in other words, the rents reserved under such a lease continue to be taxable till the expiration of the term. It was held, in 8 Barb., 23, that the tenant was not liable to pay to the landlord taxes

assessed upon such rents under a lease in perpetuity, though the lease contained a covenant binding the tenant to pay any taxes assessed upon the premises or upon the landlord, his heirs, &c., *for and in respect to the premises.*

"§ 1. All debts, owing by inhabitants of this state to persons not residing within the United States, for the purchase of any real estate shall be deemed personal property, within the town or county where the debtor resides, and as such shall be liable to taxation in the same manner and to the same extent as the personal estate of citizens of this state." (*Laws of* 1851, *chap.* 371, *p.* 721.)

The debt taxable under this section must be for the purchase of real estate, and is to be taxed in the district where the *debtor* resides, irrespective of the fact that the real estate may lie elsewhere.

In regard to real estate, they are taxable inhabitants who, living in the district, *own* or *possess* any land therein, that is to say, all persons who have the general property in the soil; and all persons who occupy it as tenants having a temporary right to its possession under a landlord. The latter, although only tenants at will, may be assessed for the land in their occupation, as appears from No. 119, *post.* The distinction is between a tenant, for however brief a period, who occupies the land for his own profit and is entitled to a notice to quit before he can be divested, and a mere agent or servant, managing the land or employed upon it for the profit of another, under wages and without any title to the possession of the land or to its products. In respect to land within the district occupied by such agents, the employer, whether holding the fee or a leasehold estate, and though residing outside of the district, is declared by No. 120, *post*, to be a taxable inhabitant in respect to the liability of such property to taxation, in the same manner as if he actually resided within its bounds.

After completing the enumeration of taxable inhabitants as defined by the various provisions above cited, and which may include sundry persons not residing in the district, the trustees are to inquire whether there are any lands lying within the boundaries of such district which are liable to taxation for town or county purposes, and are situated within three miles of the site of the school-house, the owners of which are non-residents, and which lands *are not occupied by a tenant* (who would himself be taxable) *or improved by an agent or servant*, whose occupation would render the owner *not a non-resident*, in the sense of the law for the purpose of taxation, although in fact residing in some other district. The following directions to the assessors in reference to the mode of designating the lands of non-residents, in tit. 2, chap. 13, 1st part of the

Revised Statutes (and which are of course to be followed by trustees when they find it necessary to make an original assessment) show that it is only unoccupied land which is to be so regarded:

"§ 11. The lands of non-residents shall be designated in the same assessment roll, but in a part thereof separate from the other assessments, and in the manner prescribed in the two following sections:

"§ 12. If the land to be assessed be a tract which is subdivided into lots, or be part of a tract which is so subdivided, the assessors shall proceed as follows:

"1. They shall designate it by its name, if known by one, or if it be not distinguished by a name, or the name be unknown, they shall state by what other lands it is bounded;

"2. If they can obtain correct information of the subdivisions, they shall put down in their assessment rolls, and in a first column, all the unoccupied lots in their town or ward, owned by non-residents, by their numbers alone and without the name of their owners, beginning at the lowest number and proceeding in numerical order to the highest;

"3. In the second column, and opposite to the number of each lot, they shall set down the quantity of land therein liable to taxation;

"4. In a third column, and opposite to the quantity, they shall set down the valuation of such quantity;

"5. If such quantity be a full lot, it shall be designated by the number alone; if it be a part of a lot, the part must be designated by boundaries, or in some other way by which it may be known.

"§ 13. If the land so to be assessed be a tract which is not subdivided, or if its subdivisions cannot be ascertained by the assessors, they shall proceed as follows:

"1. They shall enter in their roll the name or boundaries thereof, as above directed, and certify in the roll that such tract is not subdivided, or that they cannot obtain correct information of the subdivisions, as the case may be;

"2. They shall set down in the proper column the quantity and valuation, as above directed;

"3. If the quantity to be assessed be the whole tract, such description by its name or boundaries will be sufficient; but if a part only is liable to taxation, that part, or the part not liable, must be particularly described;

"4. If any part of such tract be settled and occupied by a resident of the town or ward, the assessors shall except such part from their assessment of the whole tract, and shall assess it as other occupied lands are assessed."

The residue of the section relates to the making of a map, which is supposed not to be applicable to trustees of school districts; if a map is already on file, the trustees may refer to it in aid of their descriptions.

Without amending the sections above quoted, the legislature, by § 1, chap. 176 of 1851, declared that "Land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-

resident land." It is not easy to reconcile the apparent conflict; and as the statute last mentioned is merely permissive, it will be safest for trustees to treat as non-resident lands only those which are unoccupied, or, at most, so occupied that there is no prospect of collecting the tax otherwise than by the sale of the land.

It is the general rule that, if "assessors should assume to assess land lying in another town or ward, their act would unquestionably be void for want of jurisdiction." (7 *Barb.*, 129.) The same general rule applies to trustees in making an original assessment, or in selecting from the town assessment roll the lands to be included in a district tax list. (*See Digest, ante, pp.* 93, 100.) To make an assessment legal, they must have jurisdiction of the particular case. If they transcend the limits of their authority, and undertake to assess property exempt by statute, they cease to be judges, and are responsible for all the consequences. A public officer is not responsible, in a civil suit, for a judicial determination in a matter over which he had jurisdiction, however erroneous it may be, but no officer can acquire jurisdiction by deciding that he has it. (5 *Barb.*, 611; *and see* 19 *Barb.*, 22.) The statute gives them jurisdiction, as to land lying outside of the territorial limits of their district, only by directing them to apportion the tax "according to the valuation of the taxable property which shall be owned or possessed by them (taxable inhabitants) at the time of making out such list within such a district, *or partly within such district and partly within an adjoining district.*" The statute evidently contemplates a single parcel of land, in the possession of a single occupant, which is intersected by the boundary line of two districts. If the possession is severed, as if the land is owned by the same person, but the part within the district is occupied by the owner and that which lies outside the district by a tenant, or *vice versa*, or if the respective parts are occupied by different tenants of the same owner, or if one of them only is occupied and the other is vacant and unimproved, then the respective parcels are to be taxed, each in the district within whose boundaries it is actually contained. So, if one of the parcels is occupied by a person as owner, and the other is also occupied by him as tenant of a third person, the parts must be taxed in the districts containing them respectively, for the trustees of the district containing the portion under lease have the right to assess it to the *owner*, disregarding the occupant. The statute, moreover, requires something more than the imaginary contact of the two parcels in a mathematical point, as where they have only an angle in common. They should be so connected as to have at least a

line of contact, and not a mere point. Where, however, two parcels in the possession of the same owner are separated only by a public highway, the fee of which he owns, subject to the right of passage in the public, this is not to be regarded as preventing their contact.

There are serious difficulties growing out of the fact that the statute, under the most restricted interpretation that can be put upon it, sometimes permits the resources of a district to be weakened by the purchase of a part of its territory by the inhabitants of an adjoining district. Though the district boundaries are not thereby altered, yet, for the eminently practical object of taxation, the result is the same as if they were. Whenever this can be prevented by a voluntary arrangement between the seller, purchaser and trustees of the respective districts, by which the land shall be granted subject to taxation in the district in which it lies, by express reservation in the deed, it may prevent a question which is much more troublesome if postponed until the levying of an extraordinary tax, such as that for building a school-house.

In respect to property exempt from taxation, it has been decided that a minister of the gospel, or priest, to bring himself within the exemption, must show that the value of both his real and personal property did not exceed $1500, and *it seems* that only that sum is to be deducted from the valuation of both, and not $1500 from the valuation of each, if each exceeded that amount. (5 *Barb.*, 609.) The latter point, however, was not necessarily involved in the decision.

The land owned by a minister of the gospel, if *rented*, can be taxed to the tenant. It is exempt from taxation to a certain extent, only *when occupied by such minister*. If, however, the occupant is the *agent* merely of the minister, so as to render it necessary to make out the assessment against the latter as owner, the property is then exempt.

Land *occupied* by a minister of the gospel, as *tenant*, has been held exempt to the amount of $1500, under the provision above quoted. (*Com. School Dec.*, 61.) The exemption is personal to the minister, and does not avail the owner.

The court of appeals held, in 3 *Kernan*, 220, that the school-houses referred to in the statute, exempting property from taxation, are those used for the public common schools, and that buildings erected and used for private unincorporated seminaries of learning, or for boarding schools, are not exempt—overruling a *dictum* in 1 *Seld.*, 376.

No. 119. Any person working land, under a contract for a share of the produce of such land, shall be deemed the pos-

sessor, so far as to render him liable to taxation therefor in the district where such land is situate. (*Sec.* 86, *chap.* 480 *of* 1847.)

The meaning of this section is believed to be, that a *tenant*, working land and paying a share of the produce as rent, is taxable, and not that a servant or agent is taxable who agrees to take a share of the produce as his *wages* for working the land. It may sometimes be a little difficult to ascertain whether the relation is that of landlord and tenant, or that of master and servant. (15 *Barb.*, 597.) It being the policy of the law (as will be apparent from No. 121) that a landlord leasing for a short term should pay the school taxes for permanent objects, unless there is an express agreement to the contrary, it will be safest in cases of doubt to avoid the question by assessing the owner.

No. 120. Every person owning or holding any real property within any school district, who shall improve and occupy the same by his agent or servant, shall, in respect to the liability of such property to taxation, be considered a taxable inhabitant of such district, in the same manner as if he actually resided therein. (*Sec.* 87, *chap.* 480 *of* 1847.)

It is not necessary that the agent or servant should *reside* on the land, in order to render the owner a taxable inhabitant. The section was intended to prevent the necessity of resorting to a sale of the land, and to authorize the collector to levy, under his warrant, upon the personal property of an owner of land not residing in the district, but managing the land himself, or by agents or workmen, instead of renting it. If the land be occupied by tenants or sub-tenants, they and not the non-resident owner are to be taxed for the parts occupied by them respectively. They are for the time being owners (8 *Wend.*, 518), and, although *they* too should not reside on the land, are made taxable inhabitants, if they improve it. It is very plain that, where land which comes within the description of the preceding section is situated partly in one district and partly in an adjoining one, the owner, although a resident of neither, is a *taxable inhabitant of both*, in respect to the liability of the several parcels to taxation in the district in which each is actually contained. Each district must tax such owner only for the part actually within its boundaries. It is difficult to see why it should be otherwise, if he happens to be a resident of either district, inasmuch as No. 118, *ante*, makes his liability to taxation depend not upon resi-

dence, but upon his being a "taxable inhabitant," within the definition of the statute.

No. 121. Where any district tax, for the purpose of purchasing a site for a school-house, or for purchasing or building, keeping in repair or furnishing such school-house with necessary fuel and appendages, shall be lawfully assessed, and paid by any person on account of any real property whereof he is only tenant at will, or for three years, or for a less period of time, such tenant may charge the owner of such real estate with the amount of the tax so paid by him, unless some agreement to the contrary shall have been made by such tenant. (*Sec.* 88, *chap.* 480 *of* 1847.)

The tenant can charge his landlord only with such taxes as he may have paid for the specific purposes mentioned. If taxed for the exemption of indigent inhabitants from rate bill, for the hire of temporary school-house or rooms, for the purchase of maps, globes, school apparatus, books for library, for district minutes, and for teacher's register of attendants, or any other object than those enumerated in the preceding section, he cannot set it off against his rent or make the landlord repay him.

No. 122. When any real estate within a district, so liable to taxation, shall not be occupied and improved by the owner, his servant or agent, and shall not be possessed by any tenant, the trustees of any district, at the time of making out any tax list by which any tax shall be imposed thereon, shall make and insert in such tax list a statement and description of every such lot, piece or parcel of land so owned by non-residents therein, in the same manner as required by law from town assessors in making out the assessment roll of their towns; and if any such lot is known to belong to an incorporated company, liable to taxation in such district, the name of such company shall be specified, and the value of such lot or piece of land shall be set down opposite to such description, which value shall be the same that was affixed to such lot or piece of land in the last assessment roll of the town; and if the same was not separately valued in such roll, then it shall be valued in proportion to the valuation which was affixed in the said assessment roll to the whole tract of which such lot or piece shall be a part. (*Sec.* 89, *chap.* 480 *of* 1847.)

The directions of the statute for the description of non-resident lands have been given at page 272, *ante*. The preceding section requires, in addition, that the name of each incorporated company known to be the owner of unoccupied land shall be specified. The non-resident lands are to be described in a part of the tax list separate from the other assessments, and the greatest care is requisite to secure a minute compliance with the demands of the law. The description must be such that the state comptroller can perceive that it will enable a purchaser at the tax sale to locate the land with certainty, and also enable the non-resident owner to know, from such description alone, that it is *his* land which has been sold, so that he may redeem it.

It is only real estate *within the district* that is to be described as non-resident property; and if it be part of a tract extending into other districts, the description in the town assessment roll may not show how much is in one district and how much in another. The trustees must supply this defect, in making out their tax list, by giving an accurate description of the boundary line of their district which intersects any unoccupied lot or subdivision of a tract. The description of each parcel separately taxed must be such that if that description, copied literally from the tax list, were inserted in a deed by the comptroller, without adding any other words, it would suffice to identify the lot and determine its boundaries.

No. 123. If any tax on the real estate of a non-resident mentioned in the tax list delivered to the collector shall be unpaid at the time he is required by law to return his warrant, he shall deliver to the trustees of such district an account of the taxes so remaining due, containing a description of the lots and pieces of land upon which any taxes were imposed, as the same were stated in his tax list, together with the amount of the tax assessed on each; and upon making oath before any justice of the peace or judge of any court of record that the taxes mentioned in such account remain unpaid, and that after diligent efforts he has been unable to collect the same, he shall be credited by said trustees with the amount thereof. (*Sec.* 90, *chap.* 480 *of* 1847.)

The description in the collector's return must be the same as that in the tax list. The account should be in substantially the following form:

Account of unpaid taxes assessed upon the lands of non-residents in School District No. , in the town of , county of , in a tax list made out by the trustees of said district, for and delivered to the collector on the day of ; 185 .

NO. AND DESCRIPTION OF LOTS AND PARTS OF LOTS.	Quant'y of land therein liable to taxation.	Valuation of such quantity.	Amount of tax.
No. 17, short tract,.....	10 acres.	$25 00	$0 75
That part of the southwest quarter of lot No. 23, short tract, which lies east of a line running north 43° west from the southeast corner of lot No. 12, in the same tract, being the district boundary line,.....	2½ "	6 00	18

COUNTY, }
Town of , } *ss.*

John Doe, being duly sworn, deposes and says that he is collector of taxes in and for School District No. , of the town of , aforesaid; that the foregoing is a true account of the taxes remaining due upon the real estate of non-residents in said district; that the taxes mentioned in such account remain unpaid, and that after diligent efforts he has been unable to collect the same.

JOHN DOE.

Sworn and subscribed before me, }
this day of , 185 . }

E. F., *Justice of the Peace.*

No. 124. Whenever the trustees of any school district shall receive such an account of unpaid taxes from any collector, they shall compare the same with the original tax list, and if found to be a true transcript, they shall add to such account a certificate to the effect that they have compared the same with the original tax list and found it to be correct, and shall immediately transmit such account, with the affidavit of the

collector and their certificate, to the treasurer of the county. (*Sec.* 91, *chap.* 480 *of* 1847.)

The certificate of the trustees should be attached to the affidavit of the collector, upon the original account. It may be as follows:

"The undersigned, trustees of School District No. , in the town of , county of , hereby certify that the preceding is an account of unpaid taxes assessed on the real estate of non-residents in said district, delivered to the trustees thereof by John Doe, collector of taxes therein, and that we have examined and compared the same with the original tax list for and found it to be correct. Dated this day of , 185 ."

This should be signed by a majority, at least, of the trustees. The purpose for which the tax list was made out ought to be stated, so that it may appear to have been for objects for which taxes may be legally imposed by a district meeting or by the trustees.

No. 125. Out of any moneys in the county treasury, raised for contingent expenses, the county treasurer shall pay to the trustees of the school district in which such taxes were imposed the amount thereof so returned as unpaid. (*Sec.* 92, *chap.* 480 *of* 1847.)

It is imperative upon the county treasurer to pay at once the amount of taxes of non-residents returned unpaid, if there be any money raised for contingent expenses in the treasury and the certificate of the trustees is regular upon its face. If there be no such money in the county treasury, it is still his duty to lay the account before the board of supervisors, as prescribed in the next section, that they may raise it. The remedy of the trustees, in case of a refusal of the county treasurer to pay, is by application to the supreme court for a writ of mandamus.

No. 126. Such account, affidavit and certificate shall be laid by the county treasurer before the board of supervisors of the county, who shall cause the amount of such unpaid taxes, with seven per cent of the amount in addition thereto, to be levied upon the lands of non-residents on which the same were imposed, and if imposed upon the lands of any incorporated company, then upon such company, in the same manner that the contingent charges of the county are directed to be levied and collected; and when collected, the same

shall be returned to the county treasury, to reimburse the amount so advanced, with the expense of collection. (*Sec.* 93, *chap.* 480 *of* 1847.)

This section seems to contemplate that the supervisors shall impose any tax returned, with the addition of seven per cent, upon the very same lands on which they were charged by the trustees, and therefore not to contemplate any correction of the description by them. This is a reason for great care on the part of the trustees in preparing the original description in the tax list.

No. 127. Any person whose lands are included in any such account may pay the tax assessed thereon to the county treasurer, at any time before the board of supervisors shall have directed the same to be levied. (*Sec.* 94, *chap.* 480 *of* 1847.)

No. 128. The same proceedings in all respects shall be had for the collection of the amount so directed to be raised by the board of supervisors as are provided by law in relation to county taxes; and upon a similar account, as in the case of county taxes of the arrears thereof uncollected, being transmitted by the county treasurer to the comptroller, the same shall be paid on his warrant to the treasurer of the county advancing the same; and the amount so assumed by the state shall be collected for its benefit, in the manner prescribed by law in respect to the arrears of county taxes upon land of non-residents; or if any part of the amount so assumed consisted of a tax upon any incorporated company, the same proceedings may also be had for the collection thereof as provided by law in respect to the county taxes assessed upon such company. (*Sec.* 95, *chap.* 480 *of* 1847.)

No. 129. In every case where a district embraces a part of more than one town, the [supervisors] of the towns so in part embraced, upon application of the trustees of such districts, or of those persons liable to pay taxes upon real property therein, shall proceed to inquire and determine whether the valuation of real property upon the several assessment rolls of said towns are substantially just, as compared with each other, so far as such district is concerned, and if determined not to be so, they shall determine the relative proportion of taxes that ought to be assessed upon the real property of the parts of such districts so lying in different towns, and the

trustees of such district shall thereupon assess the proportion of any tax thereafter to be raised, according to the determination of said [supervisors], until the same shall be altered by said [supervisors] upon like application, using the assessment rolls of the several towns to distribute the said proportion among the persons liable to be assessed for the same. In cases where two [supervisors] shall be unable to agree, they shall summon a [supervisor] from some adjoining town, who shall unite in such inquiry and determination. (*Sec.* 72, *chap.* 480 *of* 1847, *modified in conformity to No.* 56.)

The supervisors of the towns, parts of which are included in any joint district, may act under this section, upon the written application of its trustees or taxable inhabitants. The power would be practically nugatory, if its exercise depended upon the application of a majority of the inhabitants. In determining the proportion of taxes to be levied upon the respective parts of a joint district, the simplest form will be to state how many cents in the dollar, of each tax, shall be levied upon the real property of one part, and how many upon the other. A record of this determination should be made in duplicate or triplicate, according to the number of towns; each should be signed by the supervisors, and one copy filed in the clerk's office of each town. It may be in the following form, and should have annexed to it the original application upon which it was made, evidence of which is necessary to uphold the order. (21 *Barb.*, 210.)

In the matter of the equalization of assessments for school purposes, in Joint District No. , of the towns of , in county, and , in county.

Application having been made to the supervisors of the towns of and , by persons liable to pay taxes in Joint School District No. of said towns (or by the trustees), to inquire whether the valuations of real property upon the several assessment rolls of said towns are substantially just, as compared with each other, so far as such district is concerned, and the said supervisors being unable to agree, having summoned J. D., Esq., supervisor of the adjoining town of , to unite in such inquiry, and a meeting of said supervisors having been held for that purpose, at which were present A. B. and C. D. (and E. F. having been duly notified, failed to attend), and it having been determined that such valuations are not substantially just, as compared with each other, it was then and is hereby determined that the relative pro-

portion of taxes that ought to be assessed upon the real property of parts of such districts lying in different towns is as follows, viz: thirty-one cents in each dollar to be assessed upon the real property of said district, should be assessed upon the part lying in the town of , and sixty-nine cents in the dollar upon the part lying in the town of .

Dated this day of , 185 .

A. B., *Supervisor of* .
C. D., *Supervisor of* .

This determination does not affect the assessment of personal property. The trustees must, therefore, proceed as follows: Taking the aggregate of the valuations of real and personal estate in the district, as ascertained from the town assessment rolls (after making any additions of personal property found proper by the trustees), they are to determine how much of the tax is to be assessed upon the personal and how much upon the real estate. It may thus, for example, be found that of a tax of $400, $73 will be chargeable on the personal estate. The residue, $327, is then to be assessed, thirty-one per cent of it, or $101.37, on the real property in one town, and sixty-nine per cent, or $225.63, on that in the other, using the assessment roll of each town to determine the proportion which each person resident therein is to be assessed for real or personal property. (*See Digest, ante, p.* 101.)

No. 130. The valuations of taxable property shall be ascertained, so far as possible, from the last assessment roll of the town; and no person shall be entitled to any reduction in the valuation of such property, as so ascertained, unless he shall give notice of his claim to such reduction to the trustees of the district before the tax list shall be made out. (*Sec.* 96, *chap.* 480 *of* 1847.)

The first duty of trustees is to determine who are the taxable inhabitants of the district. In doing this they may find some persons not named in the town assessment roll. Some of them may be taxable, as the possessors of property which has been valued in that roll, and which belonged to other persons at the time it was made out. In the valuation of *such* property, the trustees are to be governed by the assessment roll. They are not to reduce it, unless the new owner shall give notice of his claim to such reduction *before* the tax list shall be made out, and they are not to reduce it without giving the notice provided by the next section. To reduce the valuation of one, is precisely equivalent to

raising that of every other taxable inhabitant, for it increases his quota of the tax. He cannot be subjected to such increase of taxation, beyond what his share would be according to the last town assessment roll, without being put upon his guard by the posting of a notice. (*Digest, ante, p.* 44; 1 *Denio*, 214.)

Other persons may be found to be taxable on account of their possession of property, real or personal, for which no person was assessed on the town assessment roll. Such property may be real estate casually overlooked by the assessors, or purposely omitted because it was then exempt by being occupied by a minister of the gospel, or for any other reason; or it may consist in accessions to real estate—to put an uncommon case: land formed by the gradual washing up of sand on the shore of the sea or of our great lakes, which belongs to the owner of the adjacent bank, or an island formed in the bed of a river not navigable, which is to be divided according to the original thread of the river between the proprietors on the opposite banks, or to him on whose side of the original thread it lies (17 *Pick.*, 41)—or in improvements, such as the building of a house or barn, not completed when the town assessment was made. Or the property may be personal, arising from the sale of real estate within the district, or the acquisition of personal estate by devise or otherwise to an inhabitant of the district, such property not being in the district, but following the person of its owner for the purpose of taxation. In all these cases, an original valuation by the trustees is to be made, and a notice is necessary. Additions to the last assessment roll, in consequence of buildings subsequently erected, should not be made by the trustees until they are so far completed that their value is not contingent and uncertain. (*Com. School Dec.*, 194.)

Trustees cannot assess an individual for personal property, if he has been taxed for none on the last assessment roll of the town, on the mere *supposition* that he may have more than his debts amount to. The assessment roll of the town settles the matter, and the trustees cannot vary the amount but from some *knowledge* of an alteration after that roll was made out, or to correct some known and acknowledged error. (*Id.*, 342.)

The vendor of a farm remaining in possession is liable for taxes assessed on it. (*Id.*, 83. *but see p.* 54, *Digest, ante.*)

If a taxable inhabitant sells his farm and remains in the district, he is liable to be taxed on the amount of the purchase money paid, or secured to be paid, as personal property (unless he shows that, notwithstanding the increase of his personal property, its value is still exceeded by his

debts), and the purchaser is taxable for the farm according to its assessed value on the last assessment roll of the town. (*Id.*, 285, 342.)

Where land, owned by the same person, is situated in different districts in the same town, but all included under one assessment by the town assessors, if all the land is of the same *description*, and was actually valued at the same rate per acre, without any variation on account of improvements or otherwise, or if it appears on the roll at what rates the separate parts were valued, then the valuation of the portion situate in any particular district may be ascertained by the trustees from such last assessment roll. But if the valuation by the town assessor was *general*, and if the land was of different degrees of quality or value, or if a dwelling-house or other improvements are situated in one district and none in another, a new and original assessment must in such case be made, by the trustees, giving the notices, &c., and proceeding in the mode required by law. (*Per* SPENCER, *Supt.*, *Jan.*, 1841; *and see Digest, p.* 17.)

As to what assessment roll the trustees are to be governed by, see p. 104, *ante.*

Where a person, assessed for a greater number of acres than his farm contains, omits to claim a reduction when the tax is assessed by the trustees, he will not be relieved subsequently on appeal. (*Com. School Dec.*, 341.)

No. 131. In every case where such reduction shall be duly claimed, and in every case where the valuation of taxable property cannot be ascertained from the last assessment roll of the town, the trustees shall ascertain the true value of the property to be taxed from the best evidence in their power, giving notice to the persons interested, and proceeding in the same manner as the town assessors are required by law to proceed in the valuations of taxable property. (*Sec.* 97, *chap.* 480 *of* 1847.)

The trustees, proceeding in the same manner as town assessors, should first ascertain the true value of the property to be taxed, according to their judgment. The rule prescribed by the Revised Statutes, as amended by § 3, chap. 176 of 1851, is:

"All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." (*Session Laws of* 1851, *p.* 333.)

After having completed a tax list, by taking the valuations from the town assessment roll, where it furnishes them, and having added thereto such original assessments as in their judgment are required, the statute directs that the assessors (and consequently, by the above sections, the trustees) "shall make out one fair copy thereof, to be left with one of their number. They shall also forthwith cause notices thereof to be put up at *three* or more public places in the district."

"Such notices shall set forth that the assessors have completed their assessment roll, and that a copy thereof is left with one of their number, at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August; and that on that day the assessors will meet, at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it shall be the duty of the said assessors on such day to meet, at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them; and they are hereby empowered and it shall be their duty to adjourn from time to time, as may be necessary, to hear and determine such complaints." (*Session Laws of* 1851, *p.* 333.)

The notice to be given by trustees necessarily varies somewhat from that of assessors, and may be in the following form:

Notice is hereby given, that the trustees of School District No. , in the town of , have completed their tax list to raise the sum of $10 for repairs of school-house, $8 to furnish the same with the necessary fuel (enumerating the several taxes included in the list), and that a copy thereof is left with the undersigned, A. B., at his office (mill, dwelling-house, or as the case may be), where the same may be seen and examined by any person interested, during twenty days from the date of this notice; and that said trustees will meet at the house of , in said district, on the day of next, (specifying a day subsequent at least twenty-one days, to the posting) at o'clock, in the noon, to review the said tax list, on the application of any person conceiving himself aggrieved.

Dated this day of , 185 .

A. B., }
C. D., } *Trustees of District No.* .
E. F., }

"§ 5. If the assessors shall wilfully neglect to hold the meeting specified in the last preceding section, each assessor so neglecting shall

be liable to a penalty of twenty dollars, to be sued for and recovered before any court having jurisdiction thereof by the supervisor of the town, for the use of the poor of the same town; and in case of such neglect to meet for review, any person aggrieved by the assessment of the assessors may appeal to the board of supervisors at their next annual meeting, who shall have power to review and correct such assessment." (*Session Laws of* 1851, *p.* 333.)

Quere, whether the provision for an appeal to the board of supervisors is applicable to a school district tax. Even if it is, there is no provision for suspending the proceedings for collection upon such an appeal.

The trustee with whom the tax list is left is required by law to "submit the same, during the twenty days specified in such notice, to the inspection of *all* persons who shall apply for that purpose."

The provisions of the Revised Statutes, in regard to the proceedings to be had where application is made for a reduction of the valuation, have been materially varied by the following sections of chap. 176 of 1851:

"§ 6. Whenever any person, on his own behalf or on behalf of those whom he may represent, shall apply to the assessors of any town or ward to reduce the value of his real and personal estate, as set down in their assessment roll, it shall be the duty of such assessors to examine such person under oath touching the value of his or their said real or personal estate, and after such examination they shall fix the value thereof at such amount as they may deem just; but if such person shall refuse to answer any question to the value of his real or personal estate, or the amount thereof, the said assessors shall not reduce the value of such real or personal estate. The examination so taken shall be written, and shall be subscribed by the person examined, and shall be filed in the office of the town clerk of the town or city in which such assessment shall be made; and any person who shall wilfully swear falsely, on such examination before the assessors, shall be deemed guilty of wilful and corrupt perjury.

"§ 7. The assessors of the several towns and wards of this state shall have power to administer oaths to any person applying to them, under the provisions of the sixth section of this act."

Formerly, upon the making of an affidavit, by a person asking a reduction, that the value of his personal estate did not exceed a given sum, the assessors and trustees were bound to reduce his assessment to the amount fixed by him. Under the preceding sections they are required, instead of taking a mere affidavit, to examine him orally, under oath to make true answers to such questions as shall be put to him touching the value of his real and personal estate. They are at liberty to put any question, the answer to which may assist them in

arriving at a correct conclusion on the subject, and are not at liberty to reduce his valuation, if he refuses to answer. An affidavit without the examination, or without the examination being reduced to writing, is of no avail as evidence to reduce the valuation. (12 *How. Prac. R.*, 237.) After the examination, the *assessors* are to fix the valuation, and are not limited to that fixed by the person examined.

The provision of § 6, chap. 176 of 1851, above cited, relate as well to those persons who apply for a reduction of assessments against them in a representative character, as executors, &c., as to those who ask it in their own behalf. They are entitled to a deduction for debts due from them in their representative character, and are to be examined as to the valuation of the property under their control, as such representatives in the same manner as if it belonged to them in their private capacity.

No. 132. Every taxable inhabitant of a district, who shall have been within four years set off from any other district without his consent, and shall within that period have actually paid in such other district, under a lawful assessment therein, a district tax for building a school-house, shall be exempted by the trustees of the district where he shall reside from the payment of any tax for building a school-house therein. (*Sec.* 98, *chap.* 480 *of* 1847.)

This exemption relates only to a tax for building a school-house, and does not extend to one for repairs, fuel or any other current expense. A *voluntary* contribution for building a house in another district is not ground for an exemption, nor is the fact that a person has been taxed, if he has not actually paid the tax by the sale of his property or otherwise; nor is he exempt if he has been set off upon his own petition or consent. (*Digest, ante, p.* 40.)

No. 133. Every district tax shall be assessed, and the tax list therefor be made out by the trustees, and a proper warrant attached thereto, within thirty days after the district meeting in which the tax shall have been voted. (*Sec.* 99, *chap.* 480 *of* 1847, *as amended by* § 4, *chap.* 382 *of* 1849.)

The supreme court said of this section, in 2 Denio, 161: "There are no negative words in the statute, such as would necessarily make it imperative; and in such a case, for the benefit of the public, the act may be done after the time has elapsed; the statute, as to time, being regarded as directory only." The court remark, however: "Had it

appeared, in this case, that there was such a change in the taxable persons or property in the district, between the expiration of the month and the time the tax list was made out, a different question would have been presented. But it does not appear that there was any such change, or that the plaintiff was in any way injured by the delay." The policy of the statute is, that the tax shall affect only the persons and property subject to the authority of the meeting which imposes it, and such persons as shall voluntarily expose themselves to liability while the tax list is being made out. Land purchased after a tax is voted, but before the tax list is made out, must be assessed to the purchaser, if he has taken possession; and the seller may be taxed for the purchase money secured by mortgage, as personal property, although he has reserved the possession to a tenant until a period which will not arrive until after the tax list is made out. (*Digest, p.* 39.) Persons about to remove from the district must be included in the tax list, if inhabitants when it is completed; and, as against them, it is not to be regarded as completed until the expiration of thirty days—if it can be, which is at least doubtful—until the actual delivery thereof to the collector with a warrant attached.

It is the clear duty of trustees to proceed in the making out of every tax list with such dispatch that it may be completed within thirty days, whenever practicable. (*Digest, p.* 22.) It should not be postponed because circumstances may render it expedient to delay the collection.

If the copy of an appeal be served before the trustees have completed their assessment, the time during which the appeal is pending is to be deducted in counting the thirty days.

In regard to the *form* of a tax list, the following directions, prescribed by title 2, chap. 13, 1st part of the Revised Statutes, for the government of assessors, are appropriate, and it would conduce to accuracy for trustees to conform to them, whether it be strictly necessary or not:

"§ 9. They shall prepare an assessment roll, in which they shall set down in four separate columns, and according to the best information in their power:

"1. In the first column, the names of all the taxable inhabitants in the town or ward, as the case may be;

"2. In the second column, the quantity of land to be taxed to each person;

"3. In the third column, the full value of such land, according to the definition of the term land, as given in the first title of this chapter;

"4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him.

"§ 10. Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment; and he shall be assessed for the value of the real estate held by him in such representative character, at the full value thereof, and for the personal property held by him in such representative character, deducting from such personal property the just debts due from him in such representative character."

The following are suitable forms of tax list and warrant:

List of taxes apportioned by the trustees of District No. , in the town of Trenton, county of Oneida, on the taxable inhabitants of said district, and corporations holding property therein, and upon real estate lying within the boundaries of such district, the owners of which are non-residents thereof, for the purpose of raising the sum of $481.80, laid and charged on the said district according to law, viz: $50 for the purchase of an additional site and $400 for building thereon, voted by district meeting on the day of , 185 , $10 for repairs of the school-house, $8.20 for fuel, and $13.60 for amount of exemptions of indigent inhabitants from rate bill, for term ending the day of , 185 .

NAMES OF TAXABLE INHABITANTS AND CORPORATIONS.	Quantity of land taxed.	Value of such land.	Value of taxable personal property.	Total amount of taxes.
James Thomas,	80 acres.	$400	.....	$6 81
James Thomas, executor of estate of John Thomas, deceased,	.....	.....	$1,025	17 45
Clark Cotton Manufacturing Company,	5 "	1,250	25,000	446 91
John Davison,	½ "	625	.....	10 64

Statement and description of unoccupied and unimproved lands of non-residents of said district on which a tax has been imposed as above stated:

NO. AND DESCRIPTION OF LOTS AND PARTS OF LOTS.	Quant'y of land therein liable to taxation.	Valuation of such quantity.	Amount of tax.
No. 17, short tract,.....	10 acres.	$25 00	$0 75
That part of the southwest quarter of lot No. 23, short tract, which lies east of a line running north 43° west from the southeast corner of lot No. 12, in the same tract, being the district boundary line,.....	2½ "	6 00	18

To the collector of School District No. , in the town of Trenton, in the county of Oneida:

You are hereby commanded to *receive* from each of the taxable inhabitants and corporations named in the foregoing list, and of the owners of the real estate described therein, the several sums mentioned in the last column of the said list, opposite to the persons and corporations so named and to the several tracts of land so described, or so much thereof as may be voluntarily paid to you for two successive weeks after the delivery to you of this warrant, together with one cent on each dollar thereof for your fees; and after the expiration of the time above mentioned to proceed forthwith to *collect* the residue of the sums not so paid in as aforesaid, with five cents on each dollar thereof for your fees; and in case any person upon whom such tax is imposed, shall neglect or refuse to pay the same, you are to levy the same by distress and sale of the goods and chattels of the person or corporation so taxed, in the same manner as on warrants issued by the board of supervisors to the collectors of taxes in towns; and you are to make a return of this warrant within *thirty* days after the delivery thereof to you; and within that time to pay over all moneys collected by virtue hereof to the trustees of the said district, or some one of them; and if any tax on the real estate of a non-resident mentioned in the said list shall be unpaid

at the time when you are required to return this warrant, you are to deliver to the trustees of the said district an account thereof, according to law.

Given under our hands this day of , in the year one thousand eight hundred and fifty-

A. B.,
C. D., } *Trustees.*
E. F.,

When the tax has been levied and assessed by all the trustees, their judicial duties are at an end, and it is unimportant whether all are present at the signing of the warrant, which is but a ministerial act. (19 *Barb.*, 167.) It is because the issuing of the warrant is a ministerial act, and the statute prescribes the legal effect of the process, that the trustees will be trespassers if they adopt a form which departs from it and directs the collector to act otherwise than the law directs. (16 *Wend.*, 607.) The collector acts for two weeks after the delivery of the warrant as mere *receiver* of taxes; if he undertakes to levy upon property, within that time, he becomes a trespasser. (17 *Barb.*, 147.)

The statute no longer prescribes thirty days, or any other period within which the warrant shall be made returnable (18 *Barb.*, 331); but the trustees must prescribe a time in the warrant, and should not depart from the former usage, except for strong reasons.

No. 134. The warrant issued and annexed to any tax list or rate bill shall be under the hands of the trustees of the district, or a majority of them, and it shall not be necessary for the said trustees to affix their seals to any such warrant. (*Sec.* 110, *chap.* 480 *of* 1847.)

COLLECTION OF DISTRICT TAXES.

No. 135. It shall be the duty of the said trustees, after the expiration of the said thirty days, to deliver the said tax list and warrant to the collector of the district, and such collector is hereby authorized and directed, upon receiving his warrant, for two successive weeks to receive such taxes as may be voluntarily paid to him; and in case the whole amount shall not be so paid in, the collector shall proceed forthwith to collect the same. He shall receive for his services, on all sums paid in as aforesaid, one per cent, and upon all sums col-

lected by him, after the expiration of the time mentioned, five per cent; and in case a levy and sale shall be necessarily made by such collector, he shall be entitled to traveling fees at the rate of six cents per mile, to be computed from the school-house in such district. (*Sec.* 100, *chap.* 480 *of* 1847, *as amended by* § 5, *chap.* 382 *of* 1849.)

The warrant should not be delivered to the collector until the expiration of thirty days after the tax is voted. This is necessary, in order to secure to the inhabitants the opportunity of paying their taxes with but one per cent addition, for collector's fees, during two weeks. He is not bound to give them notice that it is in his hands, and they are entitled to presume that it is not until thirty days have expired after the meeting at which the tax was voted. His fees are not to be included in the tax (11 *Wend.*, 92), and he is entitled to retain no fees upon sums which he is unable to collect.

A further reason for not issuing the warrant till the expiration of thirty days from the day the tax was voted, is because that time is allowed for the bringing of an appeal, which operates as a suspension of the proceedings, under the vote against which the appeal is brought, from the time a copy is duly served and the original forwarded to the Department of Public Instruction, until a decision is made.

The trustees ought to take a written receipt from the collector, for the tax list and warrants, specifying the return day and the amount to be collected, that they may be prepared with the proper evidence, in case it should be necessary to bring an action against him.

The *representatives of a deceased person* are not entitled to any delay in the payment of a rate bill or tax list, but are bound to pay on demand; and on refusal or neglect, the collector may proceed to sell any property found on the premises. By § 27, sub. 2, 2 *R. S.*, 28, taxes of all kinds have preference to any other demand. (*Per Spencer, Supt.*, 1840.)

Where *trustees* receive payments on tax lists or rate bills, they are regarded as receiving the same as the *agents* of *the collector;* and the latter is entitled to his per centage on the amount so received, and may legally collect it by virtue of his warrant. The collector is also entitled to his per centage on the amount paid *by* the trustees, notwithstanding no actual exchange of funds is made between the latter and the former (*Per Young, Supt.*, 1843.)

No. 136. If by the neglect of any collector any school moneys shall be lost to any school district, which might have been collected within the time limited in the warrant delivered to him for their collection, he shall forfeit to such district the full amount of the moneys thus lost, and shall account for and pay over the same to the trustees of such district, in the same manner as if they had been collected. (*Sec.* 101, *chap.* 480 *of* 1847.)

The collector's power to sell property ceases with the expiration of the time limited in the warrant for its return, even under a levy made before the return day; and unless the warrant is renewed by the trustees, his liability for not collecting becomes fixed. (18 *Barb.*, 330.) It behoves him, therefore, not to intermit his efforts to collect a tax upon any verbal directions of the trustees. Having commanded him by a warrant, he is bound to complete its execution, unless the time is extended by the equally solemn act of renewal. Nor is he bound to delay, against his own wishes, because the trustees desire it. They may sometimes desire to suspend proceedings, where he is indifferent, because a warrant, regular on its face, is sufficient for *his* protection, while they may be responsible from a defect of authority not apparent on its face. In such a case, he should require a formal certificate from the trustees, that they have withdrawn the warrant, and discharged him from the further execution thereof, and should make a return thereon to this effect:

"Under the within warrant, I have received and collected of the following persons named in the tax list thereto attached the sum of money set opposite to their respective names, viz: James Thomas, $6.81; James Thomas, executor of John Thomas, deceased, $17.45, &c., &c., and have this day ceased from the further execution thereof, by the written direction of C. D. and E. F., a majority of the trustees.

Dated this day of , 185 .

STEPHEN GRINNER,
Collector."

Transactions of this nature should never be left to rest upon loose conversations, nor should any officer of a district permit his responsibility to the inhabitants to be confounded with that of other officers, who may have distinct accounts to render for their conduct in the affair.

Where a warrant runs out in the collector's hands, he is answerable for any loss arising from his neglect, notwithstanding such warrant may have been afterwards renewed and delivered to his successor. (*Com. School Dec.*, 308.)

No. 137. For the recovery of all forfeitures, and of balances in the hands of a collector, which he shall have neglected to pay over, the trustees of the district may sue in their name of office, and shall be entitled to recover the same, with interest and costs; and the moneys recovered shall be applied by them in the same manner as if paid without suit. (*Sec.* 102, *chap.* 480 *of* 1847.)

The forfeiture referred to in this section is the amount of money which a collector *might* have collected by the exercise of proper diligence. The legal presumption is, when the return day of a warrant arrives, that the collector has all the money in his hands. It is sufficient for the trustees to prove that they delivered to him a tax list and warrant for the collection of a certain amount, and that the time therein specified for its return has expired. They may then rest their case, and it lies upon the collector to produce in his defence the receipts of the trustees for such moneys as he may have paid, his account of non-resident taxes, with his affidavit of his inability after diligent efforts to collect the same, and then to show as to *taxable inhabitants named* in the tax list, that they had no personal property within the district upon which he could levy. The trustees may then prove in reply that such taxable inhabitants had personal property, outside of the district but within the county (or, if the district includes parts of more than one county, in either county), and they ought probably to show, in addition, that the collector had express notice of the fact, or that he knew it, or that it was so far known in the district that the collector, by reasonable diligence in making inquiries, would have ascertained such facts as to make it his duty to look for property outside of the district. The question is, would an ordinary man—not a particularly keen or covetous man—armed with the power to appropriate any chattels of his debtor to the payment of a debt due himself, have failed to discover that such property was within his reach?

No. 138. Any collector, to whom any such tax list and warrant may be delivered for collection, may execute the same in any other district or town in the same county, or in any other

county where the district is a joint district, and composed of territory from adjoining counties, in the same manner and with the like authority as in the district in which the trustees issuing the said warrant may reside, and for the benefit of which said tax is intended to be collected; and the bail or sureties of any collector, given for the faithful performance of his official duties, are hereby declared and made liable for any moneys received or collected on any such tax list and warrant, and may be prosecuted for the recovery thereof. (*Sec.* 103, *chap.* 480 *of* 1847.)

This section is a legislative recognition of the validity of a bail bond, executed by a collector and his sureties, though the power to enforce the execution of such a bond, by vacating the collector's office in case of his refusal, has been withdrawn.

The following form may be adopted for a bond, which should be obtained whenever practicable:

Know all men by these presents that we, A. B., C. D., and R. S. (the collector and his sureties), are held and firmly bound to E. F., G. H., &c., trustees of School District No. , in the town of , (or Joint District No. , in the towns of and , in the sum of (here insert a sum double the amount to be collected), to be paid to the said E. F., G. H., &c., trustees as aforesaid, or to the survivor or survivors of them, or their successors; to the which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this day of , 18 , &c.

Whereas, the above bounden A. B. has been chosen (or appointed, as the case may be) collector of the above mentioned School District No. , in the town of , in conformity to the statutes relating to common schools; now, therefore, the condition of this obligation is such, that if the said A. B. shall well and truly collect and pay over all moneys received by him as such collector, and shall in all respects duly and faithfully execute all the duties of his office as collector of such district, then this obligation shall be void, otherwise to be in full force and virtue.

Signed, sealed and delivered in the presence of

A. B., [L. S.]
C. D., [L. S.]
R. S., [L. S.]

Where a collector levies upon property *out of his district*, he should put up notices of the sale of such property, as well in the district where the sale is to take place as in that of his residence. (*Per Young, Supt.*, 1842.)

No. 139. The warrants issued by the trustees of school districts, for the collection of any district tax authorized to be levied, raised and collected by this title, or for the collection of any district school rate bill, shall have the like force and effect as warrants issued by boards of supervisors of counties to collectors of taxes in towns; and the collector to whom any such warrant may be delivered for collection is hereby authorized and required to collect, from every person in such tax list or rate bill named, the sum therein set opposite to his name, or the amount due from any person or persons specified therein, in the same manner that collectors are authorized to collect town and county charges. (*Sec.* 111, *chap.* 480 *of* 1847.)

It has been before stated that a subsequent statute (§ 7, *chap.* 151 *of* 1851, *ante*, *No.* 113) has created a distinction between the force of a warrant under a rate bill and that under a tax, in this, viz., that all property exempt from executions in civil actions is exempt from levy for a rate bill, while the only property exempt from levy for a tax is the military equipment specified in the note to p. 211.

The collector may levy upon any goods and chattels lawfully in the possession of the person liable to pay the tax, that is to say, the person named in the tax list, although such person be *not the owner* of such goods and chattels. (13 *Wend.*, 629.) The individual property of an executor, administrator or trustee may be taken for a tax imposed on him in his representative character, when no property of the testator, intestate or *cestui que trust* can be found. (4 *Wend.*, 223.) But the warrant does not protect the collector, if he levies upon property in the possession of persons not named in the roll, or whose names, it is apparent from the roll itself, the assessors ought not to have set down, for example, persons whose lands are described in the part of the tax list containing the list of lands taxed as non-resident. (16 *Barb.*, 651.)

The manner in which town collectors are authorized to collect town and county charges is pointed out by the following sections of title 3, chap. 18, part 1st of the Revised Statutes:

"§ 1. Every collector, upon receiving the tax list and warrant, shall proceed to collect the taxes therein mentioned, and for that purpose

shall call at least once on the person taxed, or at the place of his usual residence, if in the town or ward for which such collector has been chosen, and shall demand payment of the taxes charged to him on his property.

"§ 2. In case any person shall refuse or neglect to pay the tax imposed on him, the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same, or of any goods and chattels in his possession, wheresoever the same may be found within the district of the collector; and no claim of property to be made thereto by any other person shall be available to prevent a sale.

"§ 3. The collector shall give public notice of the time and place of sale, and of the property to be sold, at least six days previous to the sale, by advertisements to be posted up in at least three public places in the town where such sale shall be made. The sale shall be by public auction.

"§ 4. If the property distrained shall be sold for more than the amount of the tax, the surplus shall be returned to the person in whose possession such property was when the distress was made, if no claim be made to such surplus by any other person. If any other person shall claim such surplus, on the ground that the property sold belonged to him, and such claim be admitted by the person for whose tax the same was distrained, the surplus shall be paid to such owner; but if such claim be contested by the person for whose tax the property was distrained, the surplus moneys shall be paid over by the collector to the supervisor of the town, who shall retain the same until the rights of the parties shall be determined by due course of law."

It is provided by the Revised Statutes (*vol.* 2, 1*st ed.*, *p.* 522) that "No replevin shall lie for any property, taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state."

A collector, like other ministerial officers bound to *execute* process, is protected, if the process is regular on its face, and comes from a court or body having jurisdiction of the subject matter, if nothing appears in such process to apprise him that there was a defect of jurisdiction as to the particular person or property to be affected by such process. The warrant and tax list constitute a process in the nature of an execution, and must be construed together (8 *Seld.*, 517), so that if a defect of jurisdiction appear on either, the collector is not protected. But he is not bound to inquire whether the trustees have not erred in the exercise of their jurisdiction. Thus he was held to be protected, in 7 Wend., 91, where the trustees had taken the valuations from the assessment roll, which was incomplete and subsequently varied, though the *trustees* were held liable as trespassers. But the collector was held liable, in 16 Wend., 607, where the warrant was irregular on its face,

in commanding him to proceed, "as on execution issued by justices of the peace," and in 18 Barb., 327, where it commanded him to collect five per cent on all sums mentioned in the tax list, without excepting those which should be voluntarily paid him in two weeks.

The rule for the protection of ministerial officers acting under process, regular and legal on its face, is held to prevail, even though he has *knowledge* of facts rendering it void for want of jurisdiction. (*5 Hill*, 440.) "He must be governed, and is protected," say the court "by the process, and cannot be affected by anything which he has heard or learned out of it."

No. 140. If the sum or sums of money, payable by any person named in such tax list or rate bill, shall not be paid by him or collected by such warrant within the time therein limited, it shall and may be lawful for the trustees to renew such warrant in respect to such delinquent person; or in case such person shall not reside within their district at the time of making out a tax list or rate bill, or shall not reside therein at the expiration of such warrant, and no goods or chattels can be found therein wheron to levy the same, the trustees may sue for and recover the same in their name of office. (*Sec.* 112, *chap.* 480 *of* 1847.)

Chief Justice Nelson, delivering the opinion of the supreme court, in 24 Wend., 269, where a warrant had been made out but not delivered to the collector, and the return day having passed, while it remained in the hands of the trustees, it was renewed and then delivered to the collector, says: "The renewal is in fact but a reissuing of the process, and I can perceive no reason against regarding it as an original issuing. Nor can the difference be material whether it lies in the hands of the trustees for a time and is then revived by a renewal, or in the hands of the collector unexecuted, which confessedly would justify it." In 3 Hill, 495, where the objection was that the original warrant was not under seal (which, as the law then stood, rendered it *void*), but the renewal was signed by the trustees with their seals affixed, the court say: "The renewal of the warrant made it new process for all the purposes of collecting the taxes then unpaid; it is the same thing, substantially, as though the original warrant had been recited in the renewal; and thus we have a warrant under the hands and seals of the trustees." In 4 Barb., 444, it was held that the issuing of a *new warrant* was a good execution of the power to renew. In 17 Barb., 145, that a warrant not

issued until after its renewal, becomes, by delivery to the collector with a renewal endorsed, valid and effectual process, *as of that date;* and that the rights of tax payers and duties of the collector are the same as they would have been had the warrant been made out and dated as an original process on the day of its delivery to the collector. In 20 Barb., 165, where three trustees signed the original warrant, but one of them refused to sign the renewal; that the latter was not liable for any act done under the renewal and after the original return day.

The renewal is to be under the hands of the trustees, or a majority of them, who are in office at the time of such renewal. For the purpose of preserving an authentic history of the process, it is better to append a renewal to the original warrant than to issue a new one, except in cases where the original may be discovered to have been defective in its form. It ought to specify the duration of the time for which it is renewed, and to be endorsed upon or written under the original warrant, in substantially the following form:

We hereby renew the within (or above written) warrant in respect to delinquents for the period of thirty days. Dated this day of , 185 .

A. B., C. D., E. F., *Trustees of District No. , in the town of*

A second or subsequent renewal requires the consent of the supervisor, under the next section. In that case, the words "With the approbation of the supervisor of the town of (in which the school-house is located," if the district be a joint one), should precede the above form.

Where a warrant is renewed by the trustees, the collector in office at the time of such renewal must execute it.

It being a palpable absurdity to talk of those as delinquents who have never been called upon to pay, this language of the statute is an admonition to the trustees not to suffer a warrant to run out in their hands without issuing it.

The latter clause of the above section, giving the trustees the right to sue persons named in a tax list or rate bill, is confined to such as did not *reside* within the district at the time of making out the list or bill, or who shall have ceased to reside therein at the expiration of the warrant. It cannot be regarded as having expired until a renewal may have run out; and in respect to both classes of persons, the inability to find

goods and chattels whereon to levy the tax or rate bill should be proved by the sworn return of the collector before a suit is brought. Such persons named in a rate bill must have been inhabitants of the district at the time they sent their children to school, which they may have been without being *residents* in the legal sense; in a tax list, they may have been taxable inhabitants, under some of the definitions of those words contained in the statutes regarding taxation, without ever having been residents or having in fact set foot in the district at all.

No. 141. Whenever the trustees of any school district shall discover any error in a tax list or rate bill made out by them, they may, with the approbation and consent of the State Superintendent, after refunding any amount that may have been improperly collected on such tax list or rate bill, if the same shall be required, amend and correct such tax list or rate bill, in conformity to law; and whenever more than one renewal of a warrant for the collection of any tax list or rate bill may become necessary in any district, the trustees may make such further renewal, with the written approbation of the [supervisor] of the town in which the school-house of said district shall be located, to be endorsed upon such warrant. (*Sec.* 113, *chap.* 480 *of* 1847, *modified in conformity to No.* 56.]

The application to the State Superintendent, for his consent to correct an error, should be under the hands of a majority of the trustees, and should state specifically wherein the error is supposed to consist, and in what manner they propose to amend and correct the tax list or rate bill. It will ordinarily be the better mode to revoke the imperfect tax list or rate bill and to make out a new one, stating in the heading thereof that it is "Amended and corrected with the approbation and consent of the State Superintendent of Public Instruction, by his order bearing date the day of , 185 ." The order should, of course, be carefully filed as evidence of the authority to collect under it.

The approval of the supervisor may be given by his endorsing on the warrant, under the form given in the preceding section, the words "Approved this day of , 185 . H. T., *Supervisor of* ."

If there be more than one school-house in the district, and they be located in different towns, the approval should, as a matter of prudence, be signed by the supervisors of all such towns. It is a matter of discretion with the supervisor, in the first instance, to grant or withhold his approbation. If he improperly refuses it, the remedy is by appeal upon regular notice to him.

DUTY OF TRUSTEES.

No. 142. If the moneys apportioned to a district by the town [supervisor] shall not have been paid, it shall be the duty of the trustees thereof to bring a suit for the recovery of the same, with interest, against the town [supervisor] in whose hands the same shall be, or to pursue such other remedy for the recovery thereof as is or shall be given by law. (*Sec.* 114, *chap.* 480 *of* 1847, *modified in conformity to No.* 50.)

The above section was taken substantially from the Revised Statutes. When originally enacted, all the money apportioned to a district was to be paid to the trustees. The mode of payment now, so far as it relates to the money apportioned for teachers' wages, is confined to paying to teachers the amount of orders drawn in their favor by the trustees. This section would seem to authorize the *trustees* to bring an action against the supervisor, who, having money in his hands applicable to the payment of an order, has refused to accept and pay it. Inasmuch as the drawing of a valid order is an assignment to the teacher of so much of the fund in the hands of the supervisor which the law renders it his duty to transfer, the money may be regarded as held, after the drawing the order, for the use of the teacher, so as to enable him also to maintain an action. There is nothing to regret in the supervisor's being exposed, under such circumstances, to two suits for the same money. His remedy is to pay the teacher, with interest, and then he may discharge himself of the action of the trustees by the payment of their costs.

OF THE ANNUAL REPORTS OF TRUSTEES.

No. 143. The trustees of each school district shall, between the first and fifteenth days of January, in every year, make and transmit a report, in writing, to the [school commissioner, to be deposited with the town clerk of the town in which each district is situated], dated on the first day of January, in the year in which it shall be transmitted. (*Sec.* 115, *chap.* 480 *of* 1847, *modified in conformity to No.* 67, *ante.*)

The annual report of the trustees is to be addressed to the school commissioner having jurisdiction of the town in which the school-house

of the district is located, and the trustees must deposit it before the fifteenth day of January in the clerk's office of that town. In the case of a joint district, having two or more school-houses situated in different towns *in the same county*, the original site should control, if preserved; otherwise, that of the oldest or principal school-house. If the district embraces parts of two or more counties, as many reports will be necessary; one of which must be deposited with the town clerk of each town.

It is of the highest importance to the district that the annual report should be promptly completed and deposited with the proper town clerk. If the report exhibits any failure to comply with the requirements of law, it is all the more important to have it promptly in the hands of the commissioner, as no relief can be obtained by the trustees until they shall have shown that it has been sent by them to the town clerk. A single trustee should make the report, if his colleagues neglect or refuse to complete it, or to sign that made by him; and in such case he should, in the report itself, state the reason why it bears a single signature. So, in respect to each item of information, he should give the facts so far as his own knowledge extends; explaining at the conclusion that the report is imperfect by reason of the other trustees neglecting to supply him with the necessary statistics. The trustee who makes this report will thereby exempt himself from the penalty of ten dollars, and the further forfeiture to which his colleagues are subject, under a subsequent section, for wilfully neglecting to make it.

No. 144. Every such report, signed and certified by a majority of the trustees making it, shall be delivered to the [town clerk of the town in which the school-house of each district is situated, from whom the said commissioners shall obtain the same], and shall specify:

1. The whole time any school has been kept in their district during the year ending on the day previous to the date of such report, and distinguishing what portion of the time such school has been kept by qualified teachers;

2. The amount of moneys received from the town superintendent [and supervisor] during such year, and the manner in which such moneys have been expended;

3. The number of children taught in the district during such year;

4. The number of children, residing in the district on the last day of December previous to the making of such report, between the ages of four and twenty-one, and the names of the parents or other persons with whom such children shall

respectively reside, and the number of children residing with each;

5. The amount of money paid for teachers' wages, in addition to the public money paid therefor, the amount of taxes levied in said district for purchasing school-house sites, for building, hiring, purchasing, repairing and insuring school-houses, for fuel, for supplying deficiencies in rate bills, for district libraries, or for any other purpose allowed by law, and such other information in relation to the schools and the districts as the superintendent of common schools may from time to time require. (*Sec.* 116, *chap.* 480 *of* 1847, *modified in conformity to* § 8, *chap.* 382 *of* 1849, §§ 12 *and* 13, *chap.* 151 *of* 1851, *and Nos.* 12 *and* 67, *ante.*)

Blank forms for the reports of trustees are annually prepared at the Department of Public Instruction, with printed instructions in regard to the mode of filling them up, and will be transmitted through the school commissioners to the town clerks, for the use of the districts. They will, from time to time, require other information than that particularly specified in the above section, as may be necessary to enable the superintendent to lay before the legislature a report of the actual work accomplished in educating the children of the state, and in diffusing the means of progressive education among the adults by the district libraries. The remarks here to be made relate only to those permanent items of statistics required by the statute itself.

1. In order to give effect to the provisions of *Nos.* 30 and 31, *ante*, it will be necessary that minute accuracy be required in stating the whole time any school—that is, any public district school under the charge of the trustees—has been kept in the district during the year beginning on the first day of January and ending with the thirty-first day of December preceding the report. The proper mode of stating the facts, so as to preclude any error, would be for the trustees to specify the names of the teachers, and the period of actual instruction by each, giving the number of weeks and days, and date of the beginning and ending of the period of actual instruction by each, and stating, in respect to each, whether he or she was qualified, and if (which ought never to be the case) the teacher's certificate bears date subsequent to the commencement of his term of instruction, giving the date of such certificate. The manner may be best illustrated by a specimen form:

"To the school commissioner for the first assembly district of the county of Oneida.

The undersigned trustees of School District No. , the school-house of which is situated in the town of , in the county of Oneida, certify and report that during the year ending on the 31st day of December, 1857, school has been kept in their district, and the periods of instruction have been as follows, viz: by James Mead, a qualified teacher, between the 2d day of January, 1857, and the 10th day of March, 1857, nine weeks and three days; by Ellen Craft, a qualified teacher, during the same time, nine weeks and three days, and by her between the 10th day of March and the 1st day of May, seven weeks; by Peter Slow, a teacher who taught three weeks while unqualified, but was qualified on the 1st day of April, 1857, four weeks, while qualified, his period of actual instruction beginning on the 10th day of March and ending on the 1st day of May, 1857; by Ellen Craft, a qualified teacher, between the 15th day of May, 1857, and the 22d Sept., 1857, eighteen weeks and four days; and by Mary Green, a qualified teacher, at the same time, between the 15th day of May, 1857, and the 22d Sept., 1857, eighteen weeks and four days, making in the aggregate a period of actual instruction, by two qualified teachers at the same time, of thirty-two weeks, or seven months and two weeks, and by one unqualified teacher, in addition, for three weeks."

A statement of the facts, as they actually occurred, it is always easy to make, and this alone will give the commissioner the proper materials to determine whether the district is entitled to one or two district quotas.

2. The amount of moneys received from the town superintendent [and supervisor] during such year, and the manner in which such moneys have been expended.

The amount of money received by the district includes as well that paid for its use to teachers upon the orders of trustees, as that received directly by the trustees, for library purposes, from the apportionment of state moneys, and the income of school lots, fines under the act to suppress gambling (*chap.* 504 *of* 1851), or the revenue of local funds which may come through the hands of the supervisor. The amount to be stated must include all moneys received by any of the trustees during the year, whether they be in office at the time of making the report or not. In stating the manner in which they have been expended, the amount applied upon the order of the trustees to the

compensation of teachers duly licensed must be specified, the amount applied to the purchase of books for the library, the amount applied to the purchase of maps, globes, black-boards and school apparatus, specifying particularly the articles purchased, and the dates of the resolution of the district meeting, and of the permission of the State Superintendent under the authority of which the expenditure was made. If any moneys remain unexpended, the amount, and the reason why it has not been expended, should be stated; as, for example, that it is in the hands of a trustee who is a defaulter, naming him.

It will be necessary to discriminate between the moneys received from the apportionment made by the State Superintendent and the school commissioners. Upon this point, instructions will be found upon the printed blanks, and the form of the report itself transmitted to the town clerks.

3. The number of children taught in the district during such year.

Under this head, the whole number of children who have received instruction in the district school since the first day of January preceding is to be stated, without regard to the fact whether their attendance has been long or short, or whether they or their parents were residents or non-residents. The fact must be ascertained from an examination of the sworn list of attendants at school, kept by the teachers.

4. The number of children residing in the district on the last day of December previous to the making of such report, over the age of four years and under twenty-one years of age, and the names of the parents or other persons with whom such children shall respectively reside, and the number of children residing with each.

In order to carry into effect the provisions of No. 12, *ante*, the trustees should specify how many of the children enumerated by them are Indians, and should separate them in their list of parents and guardians from other children. The public money to which they are ratably entitled is to be devoted exclusively to their education. There may be districts containing but few Indian children, and these may resort to the district school for instruction, instead of attending a separate Indian school. In such cases, the money apportioned on their account may, under a special order by the State Superintendent, to be obtained upon a verified representation of all the facts in the case, be allotted to the district in which they reside or attend school; but the fund is to be kept separate, and the district has no right to it except that which may be derived under such an order.

Comment in regard to the character of the residence of children, their parents, guardians or employers, in order to entitle the trustees to include them in the enumeration, will be found under No. 146, *post.*

5. The amount of money paid for teachers' wages, in addition to the public money paid therefor, the amount of taxes levied in said district for purchasing school-house sites, for building, hiring, purchasing and insuring school-houses, for fuel, for supplying deficiencies in rate bills, for district libraries, or for any other purpose allowed by law, and such other information in relation to the schools and the districts as the superintendent of common schools may from time to time require: The total amount of money paid for teachers' wages, in addition to that derived from the apportionment of the state funds, is to be given in full, without regard to the source whence received, rate bills, local funds, tuition bills of non-residents, fines or donations.

The above provision recognizes the right to levy a tax for insuring school-houses, though it is not mentioned in the enumeration of the powers of district meetings in No. 95, *ante*, except as it may be deemed to be included in that of voting a tax "to keep in repair" the school-house and its appendages.

In stating the amount of the tax levied during the year for the various purposes mentioned, those only should be included for the collection of which a warrant has actually been delivered to the collector between January 1st and December 31st. Unless this rule is carefully observed, the same tax may be reported in two successive years; the one in which it was voted and the warrant issued, and the other in which it was actually collected and paid to the trustees.

No. 145. It shall not be lawful for the trustees of any school district to include in their annual returns the names of any children who are supported at a county poor-house or orphan asylum. (*Sec.* 117, *chap.* 480 *of* 1847.)

This provision was intended to be a reënactment of § 6, chap. 277 of 1831, by which the duty of educating pauper children was imposed upon the towns and counties responsible for their support. The word *not* was omitted, by mistake, in the printed volume of Laws of 1847. Upon examination, it is found in the manuscript volume of original laws, in the office of the secretary of state. By chap. 261 of 1850 it was enacted:

"§ 1. The schools of the several incorporated orphan asylum societies within this state, other than those in the city of New-York, shall parti-

cipate in the distribution of the school moneys, in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts.

"§ 2. The schools of said societies shall be subject to the rules and regulations of the common schools in such cities or districts, but shall remain under the immediate management and direction of the said societies, as heretofore."

It is obvious that it is inconsistent with the provisions of the act of 1850 to consider so much of No. 145 as prohibited the enumeration of children in an incorporated orphan asylum within the district as any longer remaining in force. Deprived of their natural guardians, they are to be deemed the wards of the societies which furnish them an asylum, and as having their residence in it.

In regard to children in poor-houses, it will be seen from the general principles stated in the comment on No. 91, *ante*, that they do not acquire a residence in the district where the poor-house is situated by reason of their being within its walls. Nor ought they to be enumerated in the district from which they removed to the poor-house, for reasons stated in the comment to the next section.

No. 146. The annual reports of trustees of school districts, of children residing in their district, shall include all over four and under twenty-one years of age who shall, at the date of such report, actually be in the district, composing a part of the family of their parents or guardians or employers if such parents, guardians or employers reside at the time in such district, although such residence be temporary; but such report shall not include children belonging to the family of any person who shall be an inhabitant of any other district in this state in which such children may by law be included in the reports of its trustees. (*Sec.* 118, *chap.* 480 *of* 1847.)

It was the object of this section to relax the strictness of the rule which, as might be inferred from the terms of the 4th clause of No. 144, *ante*, would restrict the enumeration to those children who had a fixed and permanent legal residence in the district at the date of the trustees' report. It now admits to the schools upon the same terms as residents, and directs the trustees to enumerate, all children over 4 and under 21 who, at the date of the report, are *actually* in the district, composing part of the family of their employers, &c., residing at the time in the district, although such residence, that is, of the employers, parents, &c., be *temporary*. It regards domestics as composing a part of the family

of their employers. There is some obscurity in the section, from the fact that the word family is used in two distinct senses. These, as given by Webster, are: "1. The collective body of persons who live in one house and under one head or manager; a household, including parents, children and servants, and, as the case may be, *lodgers or boarders.* 2. Those who descend from a common progenitor; a tribe or race; kindred, lineage." The statute excludes mere boarders or lodgers; while in the first part of the section it obviously includes those who are in good faith *employed* in the family. There are, however, sometimes persons who pay for their board and lodging by devoting a part of their day to work, in the service of the household, while the rest is spent in attendance at school. If such persons belong to the family—in the second sense of that word, as above quoted—of an inhabitant of any other *district of this state*, then they are not to be enumerated; unless their abode in the family of their employer was primarily taken with a view to earn their subsistence by service, and not as a mere cover for their attending school in one district in preference to another where they might have attended. The enumeration is made with a view to the apportionment of money for the succeeding year; and it is to determine what amount of money will be needed for the education of those children who are accidentally in it, either because their parents or other permanent guardians reside there, or because their circumstances require them to earn a livelihood in a family, not that of their parentage. The district which is bound to furnish them with instruction, should receive an apportionment on their account; but they cannot, arbitrarily, select the districts in which they shall be enumerated or attend school. The cases on pages 16, 23, 38, 49 and 91, Digest, *ante*, taken together, will be found to support this construction. (*See* 3 *Foster's N. H. R.*, 510.)

As to a person who is not an inhabitant of some other district in this state, all the children belonging to his family are to be reported, and so are children residing in the district whose parents or guardians do not reside therein, if such parents or guardians reside elsewhere than in a district of this state; provided the residence of such children is in a family, and not in a mere boarding school or other establishment for the purpose of education.

All persons more than four and under twenty-one years of age are to be enumerated, although themselves the masters or mistresses of families.

No. 147. The trustees of school districts shall not enumerate and include in their annual reports any Indian children

residing on Indian reservations where schools are taught. (*Sec.* 119, *chap.* 480 *of* 1847.)

This section is retained as a part of the history of legislation. School districts rarely include any portion of an Indian reservation. In those that do, the Indian children within the bounds of the district are to be enumerated separately and apart from other children, for the reasons given in the comment on the fourth clause of No. 144, *ante*, until the superintendent, in the exercise of the power given by No. 12, shall otherwise direct.

No. 148. All children included in the reports of the trustees of any school district shall be entitled to attend the schools of such district; and whenever it shall be necessary for the accommodation of the children in any district, the trustees thereof may hire, temporarily, any room or rooms for the keeping of schools therein, and the expense thereof shall be a charge upon such district. (*Sec.* 120, *chap.* 480 *of* 1847.)

Children over four and under five years of age are to be included in the reports of the trustees, but their right to attend school must be regarded as taken away by the new definition of the class of persons thus entitled, contained in the next section, which restricts it to those over *five* years old. Children of so tender an age, as five or even six, can scarcely receive any benefit from the literary instruction given at a school, which is not more than outweighed by the injury to their health resulting from confinement, and the distaste for future study which they imbibe. Such simple elements of knowledge as they can learn are best imparted to them at home, in the intervals of healthful play and the freedom of domestic intercourse.

The right to attend schools in a district is the right to attend some one school or department which, in the judgment of the trustees, and of the teacher, under their general supervision, is best adapted to the education of the individual scholar, consistently with the progress of the other pupils of the district. It is not the right of the parent or pupil arbitrarily to select the school or department which the latter shall attend. The law has vested the power in the trustees to regulate the system of distribution and classification, and when this power is reasonably exercised, without being abused or perverted by colorable pretences, their decision must be deemed conclusive. (5 *Cush. Mass. Rep.*, 208.) The remedy for an error on their part is to be found in an

appeal. For a malicious abuse of their power, an action might be sustained in the name and for the benefit of the child. (14 *Barb.*, 222.) The cases in which they may exclude children will be considered under the next section.

It is for the trustees to judge when it is necessary, for the accommodation of the children, to hire rooms temporarily for the keeping of schools, for the expense of which they have the right to levy a tax, without any vote of the district. They are bound to make reasonable provision for the accommodation of all who desire to attend school; and if the school-house is too small for them, or is out of repair, or is practically inaccessible to any considerable number, from severe snows in winter, or other fortuitous circumstances, they should not hesitate to exercise the power. They are not put in office for the purpose of saving money to the tax payers, but to see to it, that all the children obtain instruction, or owe their failure to do so to the wilful neglect of themselves or their parents.

No. 149. Common schools in the several school districts in this state shall be free to all persons residing in the district, over five and under twenty-one years of age, as hereinafter provided. Persons not resident of a district may be admitted into the schools kept therein, with the approbation in writing of the trustees thereof, or a majority of them. (*Sec.* 1, *chap.* 151 *of* 1851.)

The power to admit non-resident children to the schools of a district is vested exclusively in its trustees. (*Digest*, *pp.* 95, 100.) The latter case contains the necessary instruction as to the manner in which they should exercise it. Pupils are not to be encouraged to withdraw from the schools of their own districts. By doing so, they enfeeble its pecuniary resources, aggravate the rate bills of their neighbors, and diminish the inducements of their parents and friends to exert their influence to maintain a good school in their own district. A teacher, moreover, ought not to have the additional labor thrown upon him of instructing non-residents, without his compensation being increased, unless he entered into his contract with full knowledge of the number he was to instruct.

The right to enjoy the benefit of common schools, established for all the inhabitants, is, as is well put in 8 Cush. Mass. R., 164, "a common, not an exclusive personal right; then, like other common rights, that of way for instance, it must be exercised under such limitations and

restrictions, that it shall not interfere with the equal and coextensive rights of others. Take the case of contagious disease: can it be doubted that the presence of a pupil infected could be lawfully prohibited, not for any fault or crime or wrong conduct, but simply because his attempt to insist on his right to attend, under such circumstances, would be dangerous and noxious, and so an interruption of the equal and common right?" In that case, the court held that the trustees have the right to exclude a child for open, gross immorality, manifested by licentious propensities, language, manners and habits, though not manifested by acts of licentiousness or immorality within the school, deeming it "as necessary, in the unreserved intercourse of pupils of the same school, as well without as within its precincts, to preserve the pure minded, ingenuous and unsuspecting children of both sexes from the contaminating influence of those of depraved sentiments and vicious propensities and habits, as from those infected with contagious diseases."

The analogy suggests the rule. Children may be excluded, not for punishment merely, but for the protection of others from such injurious example and influence as would entirely defeat the purposes for which schools are instituted. It is to be remembered that among the objects of instruction is not only to deter from vice, but to reclaim those who are capable of reformation, and to correct bad habits which may result from parental neglect, or, what is more deplorable, from parental example. To deal gently with the erring, and especially with erring childhood, is the dictate of humanity, policy and duty. To abandon them to their evil courses is a step involving the most serious responsibility, never to be taken until remonstrance and persuasion have been exhausted.

Such violent insubordination against reasonable and proper regulations of the school as to render it impossible to maintain necessary discipline and order, will justify the trustees in the expulsion of a pupil; but it is their duty to see, before resorting to the final extremity, whether there may not be fault on the side of the teacher as well as the scholar, and to endeavor, in such case, to reconcile the difference, without impairing the self-respect of either party. Children have rights as well as their elders; they are as keenly sensible of oppression, and naturally revolt against power, wantonly exercised for the sake of exhibiting itself. Being the weaker party, they suffer in their school days a great deal of injustice and often of outrage. The best of teachers have human infirmities, and it is an incident of their trying calling to aggravate them. It

is for the trustees to temper power with benignity, and administer justice in the spirit of tolerance and mercy.

No. 150. Where a school district is formed out of two or more adjoining towns (*not in the same county*), it shall be the duty of the trustees of such district to make and transmit a report to the [school commissioner] for each of the towns out of which such district shall be formed, within the same time and in the same manner as is required by sections one hundred and fifteen and one hundred and sixteen of this act; distinguishing the number of children over the age of four and under twenty-one years, residing in each part of a district which shall be in a different town from the other parts, and the number of children taught, and the amount of school moneys received from each part of the district. (*Sec.* 121, *chap.* 480 *of* 1847.)

The words in italics, within the parenthesis, do not belong to the text of the statute. They are inserted to make it conform to No. 67, *ante*. The sections referred to in the text, are Nos. 143 and 144.

No. 151. Where any neighborhood shall be set off by itself, the inhabitants of such separate neighborhood shall annually meet together and choose one trustee; whose duty it shall be, every year, within the time limited for making district reports, to make and transmit a report in writing, bearing date on the first day of January, in the year in which it shall be transmitted, to the [town clerk] of the town from which such neighborhood shall be set off, specifying the number of children, over the age of four and under twenty-one years, residing in such neighborhood, the amount of moneys received from the town superintendent [and supervisor] since the date of last report, and the manner in which the same has been expended. (*Sec.* 122, *chap.* 480 *of* 1847, *modified in conformity to No.* 67.)

A separate neighborhood constitutes a part of a district in some adjoining state, within which its school-house is situated, and whose affairs in general are managed by officers under a foreign jurisdiction. The trustee mentioned in the statute is to be elected by the inhabitants of this state within such district, and must himself be an inhabitant of that portion thereof within the boundaries of New-York, so that he may be amenable to its laws. The commissioner cannot receive a report

from a citizen of another state, and if one is tendered, should give notice to the inhabitants to elect another person as trustee.

No. 152. Every trustee of a school district or separate neighborhood, who shall wilfully sign a false report to the [school commissioner] of his town, with the intent of causing such [school commissioner] to apportion and pay to his district or neighborhood a larger sum than its just proportion of the school moneys of the town, shall for each offence forfeit the sum of twenty-five dollars, and shall also be deemed guilty of a misdemeanor. (*Sec.* 123, *chap.* 480 *of* 1847.)

All the trustees who jointly commit the offence may be jointly sued. (1 *Denio*, 540.) As to an *omission*, the rule is otherwise. In order to put the trustees clearly in the wrong, and disprove any pretence of inadvertance or misapprehension on their part, the commissioner should notify them of any error which he finds in their report and request them to correct it, before reporting them to the supervisor for prosecution. In order to present for decision any question involving reasonable doubt, the simplest way would be for him to inform them in writing at the same time, and that as early as possible, that he declines making any apportionment to their district on account of certain persons, naming them, included in their enumeration of pupils, and that his decision thereupon will become conclusive in thirty days, unless within that time they forward an appeal to the State Superintendent, duly verified, and serve a copy upon him, or unite with him in a written statement of the facts to be submitted. It would be well for him to proceed to state the facts as he understands them, and request them to signify their concurrence therein by signing the same. If an apportionment ought to be made before a final decision is obtained, he should make it contingent in respect to the pupils in dispute.

No. 153. All property now vested in the trustees of any school district for the use of schools in the district, or which may be hereafter transferred to such trustees for that purpose, shall be held by them as a corporation. (*Sec.* 124, *chap.* 480 *of* 1847.)

The original provision of the act of 1819, § 29, chap. 161, from which the above is taken, was enacted for the purpose of vesting in the trustees property which had been dedicated or granted for school objects before its passage. The principal incidents of a corporation are, to have

perpetual succession and existence by its corporate name, where no period is limited by its charter, and the capacity to hold real and personal estate for its corporate purposes, as an artificial body, wholly distinct from the individuals who from time to time may compose it.

No. 154. The trustees of each school district shall, once in each year, render to the district, at its annual district meeting, a just and true account, in writing, of all moneys received by them respectively for the use of their district, and of the manner in which the same shall have been expended, which account shall be delivered to the district clerk, and be filed and recorded by him. (*Sec.* 125, *chap.* 480 *of* 1847.)

Each trustee is bound to render an account, in writing, of the money which *he* has received and expended. They may, and indeed should, unite and present one account, stating the receipts and disbursements of all; but as each of them is severally liable to a penalty for omitting to do so, the way for him to escape it is to be prepared with an account of his own financial operations during the year, and submit it to the annual meeting. He is not entitled to charge in the account, or to retain, any sum to remunerate him for his personal services as trustee. (*Digest, p.* 84.) The meeting has no duty to perform in examining the account and passing upon the question of its correctness. When an account has been rendered, the supervisor may bring an action for the penalty, if it is false, and the trustee who made it remains in office; but the trustee will not be removed until its falsehood shall have been established in such a suit. (*Digest, p.* 102.) The district meeting have no power to prevent him, or the successors of the defaulting trustee, from bringing an action. (*Digest, p.* 25.)

No. 155. Any balance of such moneys, which shall appear from such account to remain in the hands of the trustees, or either of them, at the time of rendering the account, shall immediately be paid to some one or more of their successors in office. (*Sec.* 126, *chap.* 480 *of* 1847.)

When this section was originally enacted, all the trustees went out of office at each annual meeting, and were, of course, bound immediately to pay over any money in their hands to their successors. But one trustee in office has the same right to the custody of public money as another; unless the trustees by a resolution have constituted one of their number treasurer, or have appointed a bank or other trustworthy

depositary to receive it. Among the general powers conferred by the Revised Statutes upon every corporation, as such — and the trustees are a corporation in respect to the property of the district — one is: "To make by-laws, not inconsistent with any existing law, for the management of its property." It would often be a judicious exercise of this power to constitute one of their number treasurer, requiring him to give adequate security to the trustees, in their corporate capacity and name of office, and directing the collector to pay all taxes and rate bills to him. If a third person were appointed to act as the treasurer, where a convenient one can be found who is willing to give adequate security, it would have the further advantage, that no disbursement could be made by him, except upon the written order of two of the trustees.* In such a case, all of the trustees would be responsible, if they took insufficient security from the person entrusted with the money.

In regard to the liability of one trustee for the act of another, the general rule is, that it is the duty of each one to do all in his power to protect the trust property from loss by the acts of his colleagues. He ought not, therefore, to join in doing any act or in carrying into effect any arrangement by which the trust property is unnecessarily taken out of the joint protection and control of all the trustees, and is placed within the sole power and at the mercy of one or more of their number, without expecting to be held responsible for the consequences. It is laid down in Hill on Trustees, p. 310, that as a general rule the trustee so acting will be held liable in case of a loss by the default of his colleague. There are exceptions, as in the case where money is committed to one for the purpose of making an immediate payment; but money ought not to be suffered to remain in the hands of one trustee, for any considerable time, without security. Their safety lies in considering themselves as presumptively liable for all money which comes into the hands of any one of them, and conducting with the vigilant care to its speedy disbursement or ample security which such a belief is calculated to inspire.

No. 156. Every trustee who shall refuse or neglect to render such account, or to pay over any balance so found in his hands, shall for each offence forfeit the sum of twenty-five dollars. (*Sec.* 127, *chap.* 480 *of* 1847.)

It has been held, under this section (1 *Denio*, 230), that "it plainly contemplates a several penalty upon each and every trustee who shall

so neglect or refuse to perform his duty, and not a penalty upon all, jointly, who may be in default. If more than one is in default, *each* must be sued."

No. 157. It shall be the duty of his successors in office to prosecute without delay, in their name of office, for the recovery of such forfeiture; and the moneys recovered shall be applied by them to the use and benefit of their district schools. (*Sec.* 128, *chap.* 480 *of* 1847.)

This section takes effect only when the trustee in default has gone out of office. He can have no successors until that event; but when it has happened, the trustees in office are his successors, although they may have been his colleagues, and no person has been appointed or elected to fill the vacancy. Provision is made in a subsequent section for prosecuting a defaulting trustee, still in office, by the supervisor.

No. 158. Such successors shall also have the same remedies for the recovery of any unpaid balance, in the hands of a former trustee or his representatives, as are given to the town [supervisor] against a former town superintendent and his representatives; and the moneys recovered shall be applied by them to the use of their district, in the same manner as if they had been paid without suit. (*Sec.* 129, *chap.* 480 *of* 1847, *modified in conformity to No.* 53.)

No. 159. Every trustee of a school district who shall, while in office, neglect or refuse annually to render an account of the moneys received by him as such trustee, shall, for each offence, forfeit the sum of twenty-five dollars; and it shall be the duty of the [supervisor] of the town in which such trustee may reside to prosecute without delay, in his name of office, for the recovery of such forfeiture; and the moneys recovered shall be applied by such [supervisor] to the use and benefit of the district school of the district to which such defaulting trustee shall belong. (*Sec.* 130, *chap.* 480 *of* 1847, *modified in conformity to No.* 53.)

The action is to be brought by the supervisor of the town in which the trustee resides, so that, if two or more trustees are in default, residing in different towns, actions must be brought by as many different supervisors.

No. 160. Such [supervisor] shall also have the same remedies for the recovery of any unpaid balance of moneys, in the hands of such delinquent trustee in office, as are given to the [supervisor] in office against a former town superintendent; and the moneys recovered shall be applied by such town superintendent to the use of the district to which the same may belong, and be paid over to the trustee or trustees of such district who are not in default. (*Sec.* 131, *chap.* 480 *of* 1847, *modified in conformity to No.* 53.)

The action, like that under the preceding section, is to be brought by the supervisor of the town in which the defaulter resides. In order to justify such action against a trustee in office, it must appear that he has refused to apply the money in his hands to the service of the district, in payment of a valid demand against it, or in execution of some duty imposed upon the trustees by vote of the district, or by law in cases where they are authorized to make expenditures without the vote of the district, or that he has refused or omitted, after a demand, to deposit such balance, in compliance with a resolution of the trustees.

APPEALS.

No. 161. Any person conceiving himself aggrieved, in consequence of any decision made,

1. By any school district meeting;
2. By the [school commissioner] in the forming or altering, or in refusing to form or alter any school district, or in refusing to pay any school moneys to any such district;
3. By the trustees of any district in paying any teacher, or in refusing to pay him, or in refusing to admit any scholar gratuitously into any school;
4. Or concerning any other matter under the present title, may appeal to the superintendent, who is hereby authorized and required to examine and decide the same, and the decision of the State Superintendent shall be final and conclusive. (*Sec.* 132, *chap.* 48 *of* 1847.)

This section was included, as it is understood, by a clerical error in the engrossment of § 16, chap. 382 of 1849, among those thereby repealed. The repealing section was amended by chap. 78 of 1853, so as to omit § 132 from the list of sections repealed in chap. 480 of 1847, and thereby to restore and reënact it. It may be worth while to state

that, while the repealing clause of the statute of 1849 was in force, the jurisdiction of the State Superintendent to hear and decide appeals might have been upheld by virtue of other statutes. By § 7, chap. 133 of 1843, all appeals then authorized by law (and the law then in force was identical with No. 161) were required to be first presented to the *county* superintendents. Upon the abolition of the office of county superintendents, in 1847, it was enacted by chap. 388 of that year as follows:

"§ 1. All appeals, now authorized by law to be brought to a county superintendent of common schools, may, after the third day of December, one thousand eight hundred and forty-seven, be brought directly to the superintendent of common schools, who is hereby authorized and required to examine and decide the same, and whose decision in the premises shall be final and conclusive."

This statute of 1847 has never been repealed, and is an independent authority for the jurisdiction of the State Superintendent.

The supreme court, in 3 Denio, 177, declare that "this provision (No. 161) was intended as a cheap and expeditious mode of settling most if not all of the difficulties and disputes arising in the course of the execution of the law organizing and regulating common schools. The legislature has virtually declared that where a party will forego that convenient method of adjusting such a controversy as the present, and resort to the ordinary courts, it shall be at his own expense as regards costs." In 11 Wend., 91, the court made substantially the same remarks, when refusing to give relief by an action of trespass against trustees for their proceedings in selling the plaintiff's property under a tax list and warrant which were in more than one respect erroneous. A further reason for preferring the remedy by appeal to a common law action is, that the superintendent can dispose of all the questions connected with the case in a single decision; where a proceeding is wrong, he can not only reverse it, but direct the appropriate remedy, so as to redress all persons who have been injuriously affected; while an action at law enures only to the benefit of the person who brings it, and only gives pecuniary damages, without substituting a correct proceeding in the place of an erroneous one. For the extent of the Superintendent's powers upon appeal, see Digest, pp. 12, 13 and 14.

No. 162. Any person conceiving himself aggrieved by any act or decision of any trustees of school districts, concerning district libraries, or the books therein, or the use of such books, or of any librarian, or of any district meeting in rela-

tion to their school library, may appeal to the State Superintendent in the same manner as provided by law. (*Sec.* 140, *chap.* 480 *of* 1847.)

Under this and the preceding section, appeals may be made by any person conceiving himself aggrieved in consequence of:

1. Any decision made by any school district meeting; this may be either by its passing or by its rejecting any resolution offered for its consideration. A resolution passed by the meeting presents the point upon its own face. Where an inhabitant wishes to raise a question upon its refusal to take such action as he desires, his proper course is to present a written resolution, embodying the proposition he desires adopted, and get a vote upon it;

2. Any decision made by the school commissioner alone, or by him with the supervisor and town clerk, in forming or altering, or in refusing to form or alter any school districts, or in any erroneous apportionment of the public money, in refusing to include a district in the apportionment for teachers' wages or for library when entitled to be included, or in apportioning to it upon the basis of a smaller number of pupils than it has reported, or in apportioning to it a larger sum than that to which it is entitled, to the injury of other districts; and in fact any official decision, act or proceeding, in discharging or refusing to discharge any duty imposed by law, or by the regulations of the superintendent, made in pursuance of law, or incident to the duties of his office;

3. Any decision made by the trustees in paying a teacher or refusing to pay, or refusing to admit any scholar gratuitously into any school; in making out any tax list or rate bill, or in any act or proceeding whatever which they undertake to perform officially, or which, being bound by law or lawful regulations of the superintendent, or as incident to the duties of their office, they refuse or neglect to perform. In order to fix them with a responsibility for neglect to discharge a duty, and as preliminary to an appeal, it would be well for the persons conceiving themselves aggrieved to unite in a written request to the trustees to perform the act desired, or to give written notice that they have decided not to perform it. They may properly designate, in such request, a reasonable time for the performance of the duty, and therein state that the neglect of the trustees to discharge the duty within the time so specified will be regarded as equivalent to a refusal, and as justifying an appeal, or, if the case requires it, an application for the removal of the trustees from office;

4. Any act or decision by the trustees, or of the librarian, or of a district meeting, concerning the library or the books therein, or the use of such books;

5. Under the general clause "concerning any other matter under the present title," which includes the whole of this Code, any decision by any school officer, affecting the interests of a district or its inhabitants in regard to the school laws, may form the subject of an appeal. There may be cases where the powers of the superintendent are inadequate to give redress, as there may be cases in which the discretion of the local officer ought to control, but whether a particular case is such an one, must be determined as the question arises.

By whom appeals are to be made. No person can sustain an appeal unless he is aggrieved, that is, injured in his rights by the act or decision of which he complains. Generally, every inhabitant of a district is aggrieved by the wrongful act or omission of a trustee or school commissioner, by which money or property is disposed of, or not secured for the benefit of the district. But no one is aggrieved by another being included in a tax list or rate bill, although other inhabitants are by the omission of one who should be taxed; and appeals may be made by trustees in behalf of their district whenever they are aggrieved.

Before giving the rules which have been made to regulate the practice upon appeals, it is proper to call attention to some general principles in relation to the mode of drawing them up. In the first place, the department wants *facts*, and not arguments, far less injurious imputations upon the motives of parties. The facts should be distinctly averred, so that an indictment for perjury would lie if they are wilfully misstated. Therefore, they should not be stated by way of recital under a "whereas," or in any similar indirect way. Every material fact should be stated with all practicable particularity as to time, quantities, numbers, &c. Where a statement is ambiguous or doubtful in meaning, that construction is adopted which is most unfavorable to the party making it. The appellant should make out his own case; so that if no answer is put in, the superintendent will have, *in the appeal itself*, all the facts to inform him what order ought to be made. No decision can be based upon any facts except those which are stated in the appeal, and which the opposite party has had the opportunity to controvert, although such facts may have been brought to the knowledge of the superintendent in some other way. The record itself must contain enough to support the decision.

It will conduce much to the speedy disposition of a case that the papers be fairly and legibly written, upon foolscap paper when practicable, in the fashion of legal pleadings; that is, the leaves written on both sides are attached at the top, and not at the side, so that the bottom of the first page is the top of the second. They should be endorsed with the title of the case, in such a form as to indicate, briefly, what is the act or decision complained of, and the district, town and county which it affects. The papers on each side should also be endorsed with the name of the *post office* at which the party sending it desires to be addressed.

LETTERS OF INQUIRY AND EX PARTE APPLICATIONS.

Perhaps the most onerous duty of the Superintendent of Public Instruction is one which is not mentioned in the statutes. It is that of replying to applications for advice respecting the construction of the school laws, and the legality of proceedings of district meetings, of trustees, and other school officers. The effort has been made to give in this volume a full exposition, under the appropriate section, of the questions which have been found, by the experience of the department, to embarrass officers in the discharge of their duties. If, however, after examination of the instructions herein contained, it is conceived necessary to apply to the department for further information, it must be borne in mind:

1. That no *decision* can be made, on any subject affecting in any manner the rights or interests of other parties, without both sides having been heard or having been invited to present their statements. This occurs only when an appeal is regularly brought in the mode prescribed by the regulations, or where all parties have signed, and united in transmitting, a statement of facts to which they agree;

2. That an *opinion*, given under any other circumstances, must be regarded as valid only so far as the statement on which it is founded represents fairly and fully all the facts pertinent to the case. It frequently happens that two parties, applying for advice upon the same question, state the facts so differently that they receive very dissimilar replies, and are thus confirmed in their difference of opinion, instead of being reconciled. No opinion should be asked upon an abstract question or a hypothetical case; but the actual *facts* out of which the question arises should be clearly and briefly stated, with all practicable certainty as to dates and number, and in such a manner as to indicate

the object of the inquiry. The last is advisable, because a proceeding may be legally good and sufficient for some purposes, and as against some persons, while it is invalid for other purposes and against other parties. The *facts* should be stated in contradistinction to mere *evidence*, on the one hand, and to the writer's *inferences* as to the effect of those facts, on the other.

To facilitate the business of the department, and the prompt and correct transmission of answers to its correspondents, it is desirable that all letters should be written on foolscap paper, with a clear margin of one inch on the inside edge of the page. They should always specify the number of the school district, together with the name of the town or towns of which it constitutes a part, and the county in which the latter are situated. The writer should, in all cases, no matter how frequently he may write, state at what post-office he desires to be addressed.

Whenever reference may be necessary to any previous letter from the department, *its number should be given.* This enables the department to ascertain at once its contents and those of the paper to which it was a reply.

Every application for the exercise of any legal power of the department, as for special permission to be included in the apportionment of public money, &c., must be supported by an affidavit stating the facts on which it is based. When any person is interested in opposing it, the application must be accompanied with proof of service of a copy thereof on such party, in the same manner as required upon appeals.

RULES RESPECTING APPEALS.

1. An appeal must be in writing, addressed "To the Superintendent of Public Instruction," and signed by the appellant. When made by the trustees of a district, it must be signed by all the trustees, or a reason must be given for the omission of any, verified by the oath of the appellant, or of some person acquainted with such reason.

2. A copy of the appeal, and of all the statements, maps and papers intended to be presented in support of it, with the affidavit in verification of the same, must be served on the officers whose act or decision is complained of, or some of them; or if it be from the decision or proceeding of a district meeting, upon the district clerk or one of the trustees, whose duty it is to cause information of such appeal to be given to the inhabitants who voted for the decision or proceeding appealed from. Immediately after the service of such copy, the original, together with an affidavit

proving the service of a copy thereof, and stating the time and manner of the service and the name and official character of the person upon whom such service was made, must be transmitted to the Department of Public Instruction, at Albany. If an answer is received to an appeal which has not been transmitted to the department, such appeal will be dismissed.

3. Such service must be made and the original sent to the department within thirty days after the making of the decision or the performance of the act complained of, or within that time after the knowledge of the cause of complaint came to the appellant, or some satisfactory excuse must be rendered, in the appeal, for the delay.

4. The party on whom the appeal was served must, within ten days from the time of such service, answer the same, either by concurring in a statement of facts with the appellant, or by a separate answer. Such statement and answer must be signed by all the trustees or other officers whose act, omission or decision is appealed from, or a good reason on oath must be given for the omission of the signature of any of them. Such answer must be verified by oath, and a copy served on the appellants or some one of them.

5. So far as the parties concur in a statement, no oath will be required to it. But all facts, maps or papers, not agreed upon by them and evidenced by their signatures on both sides, must be verified by oath.

6. All oaths required by these regulations must be taken before a judge of a court of record, a commissioner of deeds, a justice of the peace or a school commissioner.

7. A copy of the answer, and of all the statements, maps and papers intended to be presented in support of it, must be served upon the appellants, or some one of them, within ten days after service of a copy of the appeal, unless further time be given by the State Superintendent, on application, in special cases; but no replication or rejoinder shall be allowed, except by permission of the State Superintendent, and in reference exclusively to matters arising upon the answer, and which may be deemed by such State Superintendent pertinent to the issue; in which case such replication and rejoinder shall be duly verified by oath, and copies thereof served on the opposite party.

8. Proof of the service of copies of the appeal, answer and all other papers intended to be used on the hearing of such appeal, must, in all cases, accompany the same.

9. When any proceeding of a district meeting is appealed from, and when the inhabitants of a district generally are interested in the matter of the appeal, and in all cases where an inhabitant might be an appellant had the decision or proceeding been the opposite of that which was made or had, any one or more of such inhabitants may answer the appeal, with or without the trustees.

10. Where the appeal has relation to the alteration or formation of a school district, it must be accompanied by a map, exhibiting the site of the school-house, the roads, the old and new lines of districts, the different lots, the particular location and distance from the school-houses of the persons aggrieved, and their relative distance, if there are two or more school houses in question. Also, a list of all the taxable inhabitants in the district or territory to be affected by the question, showing in separate columns the valuation of their property, taken from the last assessment roll, and the number of children between four and twenty-one belonging to each person, distinguishing the districts to which they respectively belong.

11. When the copy of the appeal is served, all proceedings upon or in continuation of the act complained of, or consequent in any way upon such act, must be suspended until the case is decided. So, where any decision concerning the distribution of public money to one or more districts is appealed from, the supervisor must retain the money which is in dispute until the appeal is decided. And where trustees have money in their hands claimed to belong to any person, or any other district, after the copy of an appeal is served on them in relation to such claim, they must retain such moneys to abide the result, and must not expend them so as to defeat the object of the appeal.

12. Whenever a decision is made by the superintendent and communicated to the school commissioner respecting the formation, division or alteration of districts, he must cause the decision to be recorded in the office of the town clerk. All other decisions communicated to him, or to the trustees of districts, are to be kept among the official papers of the clerk of the town or district, and handed over to his successors; and the district clerks are required to record all such as come to their hands, in the district book kept by them.

OF SCHOOL DISTRICT LIBRARIES.

No. 163. The sum of fifty-five thousand dollars, directed to be distributed to the several school districts of this state by the fourth section of chapter two hundred and thirty-seven of the Laws of eighteen hundred and thirty-eight, shall continue to be applied to the purchase of books for a district library, until otherwise directed. (*Part of* § 136, *chap* 480 *of* 1847, *modified in conformity to* § 9, *chap.* 151 *of* 1851, *and* § 2, *chap.* 425 *of* 1851.)

The remainder of the above section is printed as No. 103, *ante.* The selection of books for the district library is devolved by law upon the trustees; and when the importance of this most beneficent and enlightened provision for the intellectual and moral improvement of the inhabitants of the several districts, of both sexes and all conditions, is duly estimated, the trust here confided is one of no ordinary responsibility. In reference to such selections, but two prominent sources of embarrassment have been experienced. The one has arisen from the necessity of excluding from the libraries all works having directly or remotely a sectarian tendency, and the other from that of recommending the exclusion of novels, romances and other fictitious creations of the imagination, including a large proportion of the lighter literature of the day. The propriety of a peremptory and uncompromising exclusion of those catchpenny, but revolting publications which cultivate the taste for the marvellous, the tragic, the horrible and the supernatural—the lives and exploits of pirates, banditti and desperadoes of every description—is too obvious to every reflecting mind to require the slightest argument.

If any case of improper selection of books should come before the superintendent, by appeal from any inhabitant, such selection would be set aside; and if it appears from the reports, which, according to regulation, must be made, that such books have been purchased, the school commissioner will be bound to withhold the next year's library money from such district until they are replaced by works of equal cost and better character.

In regard to works of a sectarian character, which there is considerable disposition to smuggle into district libraries, the following general rules, promulgated by Supt. Randall several years ago, may be regarded as expressing the settled principles of the department:

"1. No works written professedly to uphold or attack any sect or creed in our country, claiming to be a religious one, shall be tolerated in the school libraries.

"2. Standard works on other topics shall not be excluded because they incidentally and indirectly betray the religious opinions of their authors.

"3. Works avowedly on other topics, which abound in direct and unreserved attacks on, or defence of, the character of any religious sect, or those which hold up any religious body to contempt or execration, by singling out or bringing together only the darker parts of its history or character, shall be excluded from the school libraries."

In the selection of books for a district library, information, and not mere amusement, is to be regarded as the primary object. Suitable provision should, however, be made for the intellectual wants of the young, by furnishing them with books which, without being merely juvenile in their character, may be level to their comprehension, and sufficiently entertaining to excite and gratify a taste for reading. It is useless to buy books which are not read. The indifference which is manifested in respect to many of the district libraries shows that in point of fact their volumes are little sought for. This could hardly be the case, if the annual additions were of a kind to interest the young. If we can succeed in making eager readers of the youthful generation, they will take care of the libraries in the future.

No. 164. The trustees of every school district shall be trustees of the library of such district; and the property of all books therein, and of the case and other appurtenances thereof, shall be deemed to be vested in such trustees, so as to enable them to maintain any action in relation to the same. It shall be their duty to preserve such books and keep them in repair; and the expenses incurred for that purpose may be included in any tax list to be made out by them, as trustees of a district, and added to any tax voted by a district meeting, and shall be collected and paid over in the same manner. The librarian of any district library shall be subject to the directions of the trustees thereof, in all matters relating to the preservation of the books and appurtenances of the library, and may be removed from office by them for wilful disobedience of such directions or for any wilful neglect of duty. (*Sec.* 137, *chap.* 48 *of* 1847.)

It is the duty of the trustees to provide a plain and sufficient case for the library, with a good lock, if the district shall have neglected to do so. They are also to cause the books and case to be repaired as soon as may be, when injured; and to provide sufficient wrapping paper to cover their books, and the necessary writing paper to enable the librarian to keep minutes of the delivery and return of books. These are proper expenses for the preservation and repair of the books, and are to be defrayed by a tax on the district, which is to be added by the trustees to any tax voted by a district meeting. It is not necessary that the tax to defray these expenses should be voted by the inhabitants of the district; it is to be assessed and collected in the same manner as a tax for building or repairing a school-house, or to furnish it with necessary fuel and appendages.

The trustees of each school district are required, at the time of making their annual reports, to deliver to the school commissioner a catalogue containing the titles of all the books in the district library not previously reported, with the number of volumes of each set or series, and the condition of such books, whether sound, or injured or defaced. This catalogue must be signed by them and by the librarian.

No. 165. Trustees of school districts shall be liable to their successors for any neglect or omission in relation to the care and superintendence of district libraries, by which any books therein are lost or injured, to the full amount of such loss or injury, in an action on the case, to be brought by such successors in their name of office. (*Sec.* 138, *chap.* 480 *of* 1847.)

There is great reason to fear that the duties of trustees, in respect to the preservation of the libraries in good condition, are often criminally neglected. They ought to investigate its condition as soon as they come into office, ascertain who has the custody or is responsible for every book upon its catalogue, and see that it is returned in due time to the librarian, or that the proper fine for its detention is imposed and collected. If their predecessors cannot produce or account for the books, they should be prosecuted for the value of such as may be missing.

No. 166. A set of general regulations, respecting the preservation of school district libraries, the delivery of them by librarians and trustees to their successors in office, the use of them by the inhabitants of the district, the number of volumes

to be taken by any one person at any one time or during any term, the periods of their return, the fines and penalties that may be imposed by the trustees of such libraries for not returning, for losing or destroying any of the books therein, or for soiling, defacing or injuring them, and the conditions upon which any school district may apply the library money to the payment of teachers' wages, may be framed by the State Superintendent, and printed copies thereof shall be furnished to each school district of the state; which regulations shall be obligatory upon all persons and officers having charge of such libraries, or using or possessing any of the books thereof. Such fines may be recovered in an action of debt, in the name of the trustees of any such library, of the person on whom they are imposed, except such person be a minor; in which case they may be recovered of the parent or guardian of such minor, unless notice in writing shall have been given by such parent or guardian to the trustees of such library, that they will not be responsible for any books delivered such minor. And persons with whom such minors reside shall be liable, in the same manner and to the same extent, in cases where the parent of such minor does not reside in the district. (*Sec.* 139, *chap.* 480 *of* 1847.)

REGULATIONS OF THE SUPERINTENDENT MADE IN PURSUANCE OF THE ABOVE PROVISION.

1. The librarian is required, whenever any library is purchased and taken charge of by him, to make out a full and complete catalogue of all the books contained therein. At the foot of each catalogue he is to sign a receipt in the following form:

I, A. B., do hereby acknowledge that the books specified in the preceding catalogue have been delivered to me by the trustees of School District No. , in the town of , to be safely kept by me as librarian of the said district for the use of the inhabitants thereof, according to the regulations prescribed by the Superintendent of Public Instruction, and to be accounted for by me, according to the said regulations, to the trustees of the said district, and to be delivered to my successor in office. Dated, &c.

A correct copy of the catalogue and receipt is then to be made, to which the trustees are to add a certificate in the following form:

We, the subscribers, trustees of School District No. , in the town of , do certify that the preceding is a full and complete catalogue of books in the library of the said district, now in possession of A. B., the librarian thereof, and of his receipt thereon. Given under our hands, this day of , 18

The catalogue having the librarian's receipt is to be delivered to the trustees, and a copy having the certificate of the trustees is to be delivered to the librarian for his indemnity.

2. Whenever books are added to the library, a catalogue, with a similar receipt by the librarian, is to be delivered to the trustees, and a copy, with a certificate of the trustees that it is a copy of the catalogue delivered them by the librarian, is to be furnished to him. Every catalogue received by trustees is to be kept by them carefully among the papers of the district, and to be delivered to their successors in office.

3. Whenever a new librarian shall be chosen, all the books are to be called in. For this purpose the librarian is to refuse to deliver out any books for fourteen days preceding the time so prescribed for collecting them together. At these periods, they must make a careful examination of the books, compare them with the catalogue, and make written statements, in a column opposite the name of each book, of its actual condition, whether lost or present, and whether in good order or injured, and if injured, specifying in general terms the extent of such injury. This catalogue, with the remarks, is to be delivered to the successors of the trustees, to be kept by them; a copy of it is to be made out and delivered to the new librarian, with the library, by whom a receipt, in the form above prescribed, is to be given, and to be delivered to the trustees. Another copy, certified by them as before mentioned, is to be delivered to the librarian.

4. Trustees, on coming into office, are to attend at the library for the purpose of comparing the catalogue with the books. They are at all times, when they think proper, and especially on their coming into office, to examine the books carefully, and note such as are missing or injured. For every book that is missing, the librarian is accountable to the trustees for the full value thereof, and for the whole series of which it formed a part; such value to be determined by the trustees. He is accountable, also, for any injury which a book may appear to have sustained by being soiled, defaced, torn or otherwise. And he can be relieved from such accountability only by the trustees, on its being satisfactorily shown to them that some inhabitant of the district has

been charged or is chargeable for the book so missing, or for the amount of the injury so done to any work. It is the duty of the trustees to take prompt and efficient measures for the collection of the amount for which any librarian is accountable.

5. The librarian must cause to be pasted in each book belonging to the library a printed or written label, or must write in the first blank leaf of each book, specifying that the book belongs to the library of School District No. , in the town of , naming the town and giving the number of the district; and he is on no account to deliver out any book which has not such printed or written declaration in it. He is also to cause all the books to be covered with strong wrapping paper, on the back of which is to be written the title of the book, and its number in large figures. As new books are added, the numbers are to be continued, and they are in no case to be altered; so that if a book be lost, its number and title must still be continued on the catalogue, with a note that it is missing.

The librarian must keep a blank book, that may be made by stitching together half a dozen or more sheets of writing paper. Let those be ruled across the width of the paper, so as to leave five columns of the proper size for the following entries, to be written lengthwise of the paper: In the first column, the date of the delivery of any book to any inhabitant; in the second, the title of the book delivered, and its number; in the third, the name of the person to whom delivered; in the fourth, the date of its return; and in the fifth, remarks respecting its condition, in the following form:

Time of Delivery.	Title & No. Book.	To whom.	When Returned.	Condition.
1839, June 10.	History of Va. 43.	T. Jones.	20th June.	Good.

As it will be impossible for the librarian to keep any trace of the books without such minutes, his own interest to screen himself from responsibility, as well as his duty to the public, will, it is to be hoped, induce him to be exact in making his entries at the time any book is delivered, and, when it is returned, to be equally exact in noticing its condition, and making the proper minute.

A fair copy of the catalogue should be kept by the librarian, to be exhibited to those who desire to select a book; and if there be room, it should be fastened on the door of the case.

REGULATIONS CONCERNING THE USE OF THE BOOKS IN DISTRICT LIBRARIES, PRESCRIBED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

I. The librarian has charge of the books, and is responsible for their preservation and delivery to his successor.

II. A copy of the catalogue required to be made out by art. 1 and 2 of the preceding regulations is to be kept, by the librarian, open to the inspection of the inhabitants of the district at all reasonable times. It will be found convenient to affix a copy of it on the door of the book-case containing the library.

III. Books are to be delivered as follows:

1. Only to inhabitants of the district;

2. Only one can be delivered to an inhabitant at a time; and any one having a book out of the library must return it before he can receive another;

3. No person upon whom a fine has been imposed by the trustees, under these regulations, can receive a book while such fine remains unpaid;

4. A person under age cannot be permitted to take out a book, unless he resides with some responsible inhabitant of the district; nor can he then receive a book, if notice has been given by his parent or guardian, or the person with whom he resides, that they will not be responsible for books delivered such minor;

5. Each individual residing in the district, of sufficient age to read the books belonging to the library, is to be regarded as an inhabitant, and is entitled to all the benefits and privileges conferred by the regulations relative to district libraries. Minors will draw in their own names, but on the responsibility of their parents or guardians;

6. Where there is a sufficient number of volumes in the library to accommodate all residents of the district who wish to borrow, the librarian should permit each member of a family to take books, as often as desired, so long as the regulations are punctually and fully observed. But where there are not books enough to supply all the borrowers, the librarian should endeavor to accommodate as many as possible, by furnishing each family in proportion to the number of its readers or borrowers.

IV. Every book must be returned to the library within twenty days after it shall have been taken out; but the same inhabitant may again take it, unless application has been made for it while it was so out of the library by any person entitled, who has not previously borrowed

the same book, in which case such applicant shall have a preference in the use of it. And where there have been several such applicants, the preference shall be according to the priority in time of their applications, to be determined by the librarian. Upon application to the superintendent, the time for keeping books out of the library will be extended to a period not exceeding twenty-eight days, where sufficient reasons for such extension are shown.

V. If a book be not returned at the proper time, the librarian is to report the fact to the trustees; and he must also exhibit to them every book which has been returned injured, by soiling, defacing, tearing or in any other way, before such book shall again be loaned out, together with the name of the inhabitant in whose possession it was when so injured.

VI. The trustees of school districts being, by virtue of their office, trustees of the library, are hereby authorized to impose the following fines:

1. For each day's detention of a book, beyond the time allowed by these regulations, six cents; but not to be imposed for more than ten days' detention;

2. For the destruction or loss of a book, a fine equal to the full value of the book, or of the set, if it be one of a series, with the addition to such value of ten cents for each volume. And on the payment of such fine, the party fined shall be entitled to the residue of the series. If he has also been fined for detaining such book, then the said ten cents shall not be added to the value;

3. For any injury which a book may sustain after it shall be taken out by a borrower, and before its return, a fine may be imposed of six cents for every spot of grease or oil upon the cover, or upon any leaf of the volume; for writing in or defacing any book, not less than ten cents, nor more than the value of the book; for cutting or tearing the cover or the binding, or any leaf, not less than ten cents, nor more than the value of the book;

4. If a leaf be torn out, or so defaced or mutilated that it cannot be read, or if anything be written in the volume, or any other injury done to it which renders it unfit for general circulation, the trustees will consider it a destruction of the book, and shall impose a fine accordingly, as above provided, in case of loss of a book;

5. When a book shall have been detained seven days beyond the twenty days allowed by these regulations, the librarian shall give notice to the borrower to return the same within three days. If not returned

at that time, the trustees may consider the book lost or destroyed, and may impose a fine for its destruction, in addition to the fines for its detention.

VII. But the imposition of a fine, for the loss or destruction of a book, shall not prevent the trustees from recovering such book in an action of replevin, unless such fine shall have been paid.

VIII. When, in the opinion of the librarian, any fine has been incurred by any person under these regulations, he may refuse to deliver any book, to the party liable to such fine, until the decision of the trustees upon such liability be had.

IX. Previous to the imposition of any fine, two days' written or verbal notice is to be given by any trustee or the librarian, or any other person authorized by either of them, to the person charged, to show cause why he should not be fined for the alleged offence or neglect; and if, within that time, good cause be not shown, the trustees shall impose the fine herein prescribed. No other excuse for an extraordinary injury to a book, that is, for such an injury as would not be occasioned by its ordinary use, should be received, than the fact that the book was as much injured when it was taken out, by the person charged, as it was when he returned it. As such loss must fall on some one, it is more just that it should be borne by the party whose duty it was to take care of the volume than by the district. Negligence can only be prevented, and disputes can only be avoided, by the adoption of this rule. Subject to these general principles, the imposition of all or any of these fines is *discretionary* with the trustees, and they should ordinarily be imposed only for *wilful* or *culpably negligent* injuries to books, or where the district actually sustains a loss or serious injury. Reasonable excuses for the detention of the books beyond twenty days should in all cases be received.

X. It is the special duty of the librarian to give notice to the borrower of a book, that shall be returned injured, to show cause why he should not be fined. Such notice may be given to the agent of the borrower who returns the book, and it should always be given at the time the book is returned.

XI. The librarian is to inform the trustees of every notice given by him to show cause against the imposition of a fine; and they shall assemble at the time and place appointed by him, or by any notice given by them, or any one of them, and shall hear the charge and defence. They are to keep a book of minutes, in which every fine imposed by them, and the cause, shall be entered and signed by them, or the major

part of them. Such original minutes, or a copy certified by them, or the major part of them, or by the clerk of the district, shall be conclusive evidence of the fact that a fine was imposed, as stated in such minutes, according to these regulations.

XII. It shall be the duty of trustees to prosecute promptly for the collection of all fines imposed by them. Fines collected for the detention of books, or for injuries to them, are to be applied to defray the expense of repairing the books in the library. Fines collected for the loss or destruction of any book, or of a set or series of books, shall be applied to the purchase of the same or other suitable books.

XIII. These regulations being declared by law "obligatory upon all persons and officers having charge of such libraries, or using or possessing any of the books thereof," it is expedient that they should be made known to every borrower of a book. And for that purpose, a printed copy is to be affixed conspicuously on the case containing any library, or on one of such cases if there be several, and the librarian is to call the attention to them of every person, on the first occasion of his taking out a book.

The offices of trustee and librarian are incompatible, and cannot be held by the same person.

No. 167. The legal voters in any two or more adjoining districts may, in such cases as may be approved by the *town superintendent*, unite their library moneys and funds, as they shall be received or collected, and purchase a joint library for the use of the inhabitants of such districts, which shall be selected by the trustees thereof, or by such persons as they shall designate, and shall be under the charge of a librarian, to be appointed by them; and the foregoing provisions of this act shall be applicable to the said joint libraries, except that the property in them shall be deemed to be vested in all the trustees, for the time being, of the districts so united. And in case any such district shall desire to divide such library, such division shall be made by the trustees of the two districts whose libraries are so united, and in case they cannot agree, then such division shall be made by the *town superintendent*. (*Sec.* 141, *chap.* 480 *of* 1847.)

No provision is made in the act of 1856 for devolving the powers of the former town superintendent, under the above section, upon the supervisors or school commissioners. The section must, therefore, for the present, remain inoperative.

No. 168. Where, by reason of the non-compliance with the conditions prescribed by law, the library money shall be withheld from any school district, the same may be distributed among other districts complying with such conditions, or may be retained and paid subsequently to the district from which the same was withheld, as shall be directed by the State Superintendent, according to the circumstances of the case. (*Sec.* 142, *chap.* 480 *of* 1847.)

The determination of the State Superintendent may be made upon an appeal from the decision of the school commissioner, excluding the district from an apportionment. Upon a notice from the commissioner, that it is his intention to exclude the district, the trustees may, with his concurrence, present a statement of the facts to the superintendent, for his direction. Such statement must be verified and served upon the commissioner, that he may add such remarks as the case calls for before forwarding it to the department. That course may be pursued in regard to any case of *accidental* delinquency, under the next section. In reference to the form and contents of such statement, see pp. 133, 134, *ante.*

No. 169. Whenever an apportionment of the public money shall not be made to any school district, in consequence of any accidental omission to make any report required by law, or to comply with any other provision of law, or any regulation, the State Superintendent may direct an apportionment to be made to such district, according to the equitable circumstances of the case, to be paid out of the public money on hand; or, if the same shall have been distributed, out of the public money to be received in a succeeding year. (*Sec.* 39, *chap.* 480 *of* 1847.)

No. 170. The State Superintendent, whenever requested by the trustees of a school district, under the directions of the legal voters of such district, may select a library for their use, and cause the same to be delivered to the clerk of the county in which such district is situated, at its expense. (*Sec.* 143, *chap.* 480 *of* 1847.)

No. 171. Whenever the Superintendent of Public Instruction shall receive from any author or publisher two copies of any book published by him or them, a copyright of which shall have been duly entered under the laws of the United

States, with an offer on the part of such publisher to furnish such book to the district school libraries of the state, and the Packer Collegiate Institute of the city of Brooklyn, at a price not exceeding two-thirds of the retail price of said book, which price shall be specified in said offer, it shall be the duty of said superintendent to place one of said copies in the state library at Albany, retaining the other for his own use, and to make a complete list with the prices annexed, of such of said books as in his opinion are proper and suitable to be placed in the district school libraries of the state; and, thereupon, on or before the first Tuesday of December in each year, the said superintendent shall cause printed circulars, addressed to the trustees of common schools, and the trustees of the Packer Collegiate Institute of the city of Brooklyn, to be forwarded by mail or otherwise to the several town superintendents, containing the titles and prices of said books so selected and specified, with such remarks as the said superintendent may deem useful, together with a statement of the estimated amount of library money to be apportioned to the town and the said Packer Collegiate Institute for the current year, and a brief notice that the books so specified, or so many of them as the trustees may select, not exceeding in amount the library money to which such district or said Packer Collegiate Institute may be entitled, can be obtained in the manner provided by this act. (*Sec.* 1, *chap.* 186 *of* 1856.)

No. 172. The trustees, or a majority thereof, of any school district entitled to participate in the library moneys, together with the trustees of the said Packer Collegiate Institute, may select from such list, or the list of any previous year, so many of said books as they may wish to purchase, under the limitation aforesaid, and shall make and deliver to the town superintendent of schools, as soon after the receipt of such circular as practicable, a list of the books so selected, with the prices annexed, to the town superintendent, specifying the number of the district or the institution for which the same are ordered; and the town superintendent shall thereupon make out for the town a complete list of the books so selected by each of the several districts, and the said Packer Collegiate Institute, specifying the number, titles and prices of the books selected by each, under the limitation aforesaid, and shall, before the time in the next section mentioned, transmit such list to the county clerk of his county, who shall file the same

in his office; the delivery of such list by the trustees to the town superintendent shall be taken and reported by him as a lawful expenditure of the library money. (*Sec.* 2, *chap.* 186 *of* 1856.)

No. 173. The several county clerks shall thereupon, and on or before the last Tuesday in each year, make out a complete list for the county of all the books so ordered, specifying the number, title and prices of the books ordered by each town and the said institute, and forthwith transmit a copy thereof to the State Superintendent. (*Sec.* 3, *chap.* 186 *of* 1856.)

No. 174. The State Superintendent shall, thereupon, and on or before the first Tuesday of February in each year, procure the books so ordered, and cause the same, as ordered, to be transmitted to the county clerks of the several counties, who shall deliver the same on demand, taking a receipt therefor, to the several town superintendents and the trustees of the said institute, according to the number ordered by the respective towns and the trustees of said institute, to be distributed by the town superintendent among the several school districts entitled to the same, and the trustees of said institute; the receipts so taken by the county clerks from the town superintendents shall be sent by mail to the State Superintendent, as vouchers for the proper distribution of the same. The expenses of transportation, and other necessary disbursements under this act, shall be certified by the State Superintendent, and paid by the comptroller out of the money annually appropriated for the transportation of books from the public offices. (*Sec.* 4, *chap.* 186 *of* 1856.)

No. 175. The State Superintendent shall retain in his hands so much of the library money apportioned to each town and ward as may be necessary to pay for the books ordered by such town or ward, or the said Packer Collegiate Institute, and shall pay the same to the author or publisher of said books, on the contract for the purchase thereof, taking receipts therefor and filing the same in his office. (*Sec.* 5, *chap.* 186 *of* 1856.)

No. 176. Town superintendents [school commissioners, supervisors], trustees, collectors and clerks of school districts, refusing or wilfully neglecting to make any report, or to per-

form any other duty required by law, or by regulations or decisions made under the authority of any statute, shall severally forfeit to their town or to their district, as the case may be, for the use of the common schools therein, the sum of ten dollars for each such neglect or refusal, which penalty shall be sued for and collected by the supervisor of the town, and paid over to the proper officers to be distributed for the benefit of the common schools in the town or district to which such penalty belongs; and when the share of school or library money apportioned to any town or district, or school, or any portions thereof, or any money to which a town or district would have been entitled, shall be lost in consequence of any wilful neglect of official duty by any town superintendent, [school commissioner, supervisor], or trustees or clerks of school districts, the officers guilty of such neglect shall forfeit to the town or district the full amount, with interest, of the moneys so lost; and they shall be jointly and severally liable for the payment of such forfeiture. (*Sec.* 145, *chap.* 480 *of* 1847.)

As all the duties formerly discharged by the town superintendents are now divided between the school commissioners and the supervisors, the latter are subject to the same penalties, for any official delinquency affecting the interest of a town or district, as the town superintendent would have been.

SUITS AGAINST DISTRICT OFFICERS.

No. 177. In any suit which shall hereafter be commenced against town superintendents or officers of school districts, for any act performed by virtue of or under color of their offices, or for any refusal or omission to perform any duty enjoined by law, and which might have been the subject of an appeal to the superintendent, no costs shall be allowed to the plaintiff in cases where the court shall certify that it appeared on the trial of the cause that the defendants acted in good faith. But this provision shall not extend to suits for penalties, nor to suits or proceedings to enforce the decisions of the superintendent. (*Sec.* 146, *chap.* 480 *of* 1847.)

The object of the legislature in this provision was, as before remarked, to punish those persons who will harass school officers by prosecution in the courts, where they might have found a remedy in appealing to

the State Superintendent, by compelling them to bear their own costs whenever it shall appear to the court that the defendants, though acting illegally, acted in good faith. (*See* 3 *Denio*, 177, *before quoted.*) The exemption from costs, given by the above section to town superintendents, will doubtless extend to supervisors or school commissioners, if prosecuted for their official action in respect to any duty formerly imposed upon the town superintendent.

By § 108, title 4, chap. 8, part 3, Revised Statutes, it is provided that in suits against trustees of school districts, and certain other officers, "the debt, damages or costs recovered against them shall be collected in the same manner as against individuals, and the amount so collected shall be allowed to them in their official accounts."

This provision does not relate to actions for personal delinquencies, but was intended to provide only for those cases in which the officer was subjected to damages and costs, without his fault, in consequence of the legitimate performance of a public duty. The legal presumption, when a judgment is recovered against an officer, is, that it was incurred by his doing something which he ought not to have done, and when it includes costs, that he has failed to make it appear that, though mistaken, he acted in good faith. For this reason his account is subjected to the scrutiny provided by the following section, before he can be reimbursed or permitted to retain the amount from money in his hands.

If a trustee's term of office expires while an action is pending against him and the other trustees in their official character, his successor may procure himself to be substituted, or in a court of record—but not in a justices' court—the opposite party may procure him to be substituted as defendant. (2 *Denio*, 125.)

No. 178. Whenever a suit shall have been commenced, or shall hereafter be commenced, against the trustees of a school district, in consequence of acts by them performed in pursuance of and by the direction of such district, for any act performed by virtue of or under color of their office, and such suit shall have been finally determined: or,

Whenever, after the final determination of any suit commenced by or against any trustees or other officers of a school district, a majority of the taxable inhabitants of any school district shall so determine:

It shall be the duty of the trustees to ascertain, in the manner hereinafter described, the actual amount of all the costs, charges and expenses paid by such officer, and to cause

the same to be assessed upon and collected of the taxable inhabitants of said district, in the same manner as other taxes of said district are by law assessed and collected, and, when so collected, to pay the same over to the officer by virtue of this act entitled to receive the same; but this provision shall not extend to suits for penalties, nor suits or proceedings to enforce the decisions of the superintendent. (*Sec.* 1, *chap.* 172 *of* 1847, *as amended by chap.* 388 *of* 1849.)

This section is singularly blind; and such judicial commentary as has been spent upon it has not, on the whole, rendered it more lucid. All the judges who have expressed opinions concur in regarding it as having "great and embarrassing ambiguities." (*See* 6 *How. Pr. R.*, 334; 8 *id.*, 125, 358; 10 *id.*, 145, 468.) By some, it is regarded as authorizing the inhabitants at a district meeting to vote a tax for the payment of legal expenses incurred by the *trustees* in the defence of an action brought *against* them in their official character, and permitting the trustees to levy such a tax without an application to the board of supervisors, under the succeeding sections: But as requiring the authority of the board of supervisors to levy such taxes, if it did not appear on the face of the judgment that the trustees were sued *as trustees*, and not as persons who had lost the protection of their official character, and were mere trespassers; and as also requiring such authority of the board of supervisors in all cases where the action had been brought *by* the trustees, or either by or against any officer other than the trustees. By others, the vote of the supervisors is regarded as in all cases indispensable; but it is not clear in what cases the vote of a district meeting is requisite to give the board of supervisors jurisdiction, and in what cases that board may direct the levying a tax without the question being first submitted to a district meeting.

Amid these doubts, the only entirely safe course is to take all the steps pointed out by the statute in every case; that is to say, to make out the verified account mentioned in the succeeding section, and serve it with the notice therein prescribed upon the trustees; present it, also, to a district meeting, and procure a vote directing the trustees to ascertain the actual amount of such costs, &c., and to cause the same to be assessed and collected. If the inhabitants are satisfied with the items, as presented, the resolution should declare that fact. If they are not, and the account is claimed by the trustees in their own behalf, the meeting may appoint some person to contest it before the board of supervisors. The account, with the resolution adopted by the district

meeting, in respect to it, together with evidence of the service upon the trustees of a copy thereof and of the notice prescribed, should then be presented to the board of supervisors. If that board then directs the account to be paid, there is small room for doubt that a tax founded upon all these proceedings would be legal. If any of them are omitted, the result will depend upon the particular judge before whom the question is brought, and his peculiar method of endeavoring to make that intelligible which the legislature has left unintelligible.

No. 179. Whenever any person mentioned in the first section of this act shall have paid any costs, charges or expenses, as mentioned in said first section, he shall make out an account of such charges, costs and expenses, so paid by him, giving the items thereof, and verify the same by his oath or affirmation; he shall serve a copy of said account so sworn to upon the trustees of the district against which such claim shall be made, together with a notice in writing that on a certain day therein specified he will present such account to the board of supervisors of the county in which such school district shall be situated, for settlement at some legal meeting of such board; and it shall be the duty of the officer upon whom such copy, account and notice shall be served to attend, at the time and place in such notice specified, to protect the rights and interests of such district upon such settlement. (*Sec.* 2, *chap.* 172 *of* 1847.)

Proof of service of a copy of the account and of the notice upon the *trustees* is essential to give jurisdiction to the board of supervisors. It is very plain that when the trustees are themselves the claimants they ought to show that they have given notice of their claim, with its items verified by oath, and notice of the time it is to be presented to the supervisors, to a district meeting, so that it shall have had the opportunity either to admit its justice or to make provision for contesting its allowance. This is not in the terms of the statute, but is in the equity of the case, and the board of supervisors might insist upon it as a preliminary to paying the account.

No. 180. Upon the appearance of the parties, or upon due proof of service of the notice and copy of account mentioned in the second section of this act, if the said board shall be of opinion that such account or any portion thereof ought justly to be paid to the claimant, such board may, by an order to be

made by a majority of all the members elected to the same, and to be entered in its minutes, require such account, or such part thereof as such board shall be of opinion ought justly to be paid to the claimant by such district, to be so paid; but no portion of such account shall be so ordered to be paid which shall appear to the said board to have arisen from the wilful neglect or misconduct of the claimant. The account, with the oath of the party claiming the same, shall be prima facie evidence of the correctness thereof. The board may adjourn the hearing, from time to time, as justice shall seem to require. (*Sec.* 3, *chap.* 172 *of* 1847.)

The board of supervisors act *judicially* in allowing or disallowing an account, and their decision will not be reviewed in any tribunal. (8 *How. Pr. R.*, 358.) Their order should recite all the facts necessary to show their jurisdiction, such as the presentation of an account in items, its verification by the oath of the claimant, the service upon the trustees or their appearance to contest it, and should declare that no portion of the account, as allowed and ordered to be paid, appeared to have arisen from the wilful neglect or misconduct of the claimant. It should conclude, after these recitals: "It is therefore ordered by this board, a majority of all the members elected to the same having voted for this order, that the sum of dollars cents be paid by School District No. of the town of , in satisfaction of such account; that a copy of this order be forthwith served by the clerk upon the trustees of said district, to the end that within thirty days after such service the said trustees may, as required by law, cause the same to be entered at length in the book of records of said district, and issue to the collector of said district a warrant for the collection of the amount herein above directed to be paid."

No. 181. It shall be the duty of the trustees or any school district, within thirty days after service of a copy of such order upon them, to cause the same to be entered at length in the book of records of said district, and to issue to the collector of said district a warrant for the collection of the amount so directed to be paid, in the same manner and with the like force and effect as upon a tax voted by said district. (*Sec.* 4, *chap.* 172 *of* 1847.)

The concluding words, "*as* upon a tax voted," &c., have been cited as implying that the tax was not, in point of fact, voted by the district.

The heading of the tax list made out by the trustees should state the purpose for which the money is raised, and the date of the order of the board of supervisors authorizing it. The remedy of the claimant, in case the trustees refuse or neglect to issue their warrant, is by application to the supreme court for a mandamus. (*See Digest, ante, p.* 43.) Their wilful refusal would be sufficient ground for an application for their removal from office, under No. 8.

MISCELLANEOUS PROVISIONS.

No. 182. A school for colored children may be established in any city or town of this state, with approbation of the commissioners or town superintendent of such city or town, which shall be under the charge of the trustees of the district in which such school shall be kept; and in places where no school districts exist, or where from any cause it may be expedient, such school may be placed in charge of trustees to be appointed by the commissioners or town superintendent of common schools of the town or city, and, if there be none, to be appointed by the State Superintendent. Returns shall be made by the trustees of such school to the [school commissioners] at the same time and in the same manner as now provided by law in relation to districts; and they shall particularly specify the number of colored children over [four] and under [twenty-one] years of age, attending such school from different districts, naming such districts respectively, and the number from each. The [school commissioners] shall apportion and pay over to the trustees of such school a portion of the money received by them annually, in the same manner as now provided by law in respect to school districts, allowing to such schools the proper proportion for each child over [four] and under [twenty-one] years who shall have been instructed in such school at least *four* months by a teacher duly licensed, and shall deduct such proportion from the amount that would have been apportioned to the district to which such children belong; and in his report to the State Superintendent, the town superintendent shall specially designate the schools for colored children in his town or city. (*Sec.* 147, *chap.* 480 *of* 1847, *modified in conformity to* § 13, *chap.* 151 *of* 1851, *and No.* 67, *ante.*)

There is some obscurity in the provisions of this section. A school in which children are separated from others, on the ground of their

complexion, is an anomaly which it is very difficult to reconcile with our political or educational system. The policy of the section appears to be to constitute so many of the colored children, of a town which establishes a colored school under trustees distinct from those of a territorial district, as attend a separate school therein for four months, a *quasi* district for the purpose of the apportionment of public money. Those who attend the schools in any territorial district, or who attend no school at all, are left to be enumerated in the district whose boundaries contain their residence. Separated as a class, they are deprived of the advantages which white and Indian children derive from having their rate bills reduced by the enumeration of those who do not attend the school. This palpable injustice is a strong argument against the establishment of such schools. Where they are established, the most liberal interpretation of the law should be employed in their favor.

Where a separate school for colored children is established in a *district*, the trustees must provide suitable rooms at the expense of the district, and must treat it in all respects as a part of the district school; maintaining a qualified teacher, applying the public money to his compensation, and paying any remainder of his wages, beyond the public money applied thereto, by rate bill upon the attendants in *all* the departments of the district school, without discrimination. They have no right to give to colored children teachers or facilities for education in any respect inferior to those of the whites. The law contemplates no such distinction between them, and it is impossible to render its provisions harmonious with any attempt to institute one. Where, in such a branch district school, colored children attend who reside in other districts, the law assigns the public money apportioned on their account to the district in which they attend.

In the other case, of a colored school established under the charge of trustees, distinct from the trustees of a district, that is, of a *town* colored school, the only way to avoid the injustice above referred to is to regard "the *proper* proportion" for each child instructed four months, as to be found by dividing the money apportioned to the district of his residence equally between the children who have attended at least four months. A proportion must be between things of the same nature; if one term of it is based upon attendance, the other must be also.

No. 183. No person shall wilfully disturb, interrupt or disquiet any assemblage of persons met at any school district, with the assent of the trustees of the school district, for the

purpose of receiving instruction in any of the branches of education usually taught in the common schools of this state, or in the science of music. (*Sec.* 1, *chap.* 228 *of* 1845.)

This statute was entitled "An act to prevent the disturbance of evening schools in the several school district houses of this state." The terms of the act are much broader than its title, and extend to an assemblage of persons at any time of the day, as well as in the evening. It has been repeatedly held, that the title is no part of a statute (*Dwarris on Statutes*, 653); and though the title is sometimes referred to for aid in removing ambiguities, where the intention of the legislature cannot be plainly gathered from what are acknowledged parts of the statute, it is not to restrict the clear meaning of the latter, and is regarded in any case as having only slight influence in its exposition. (1 *Gray Mass. R.*, 477.)

No. 184. Whoever shall violate the provisions of the foregoing section may be tried before any justice of the peace of the county, or any mayor, alderman, recorder or other magistrate of any city where the offence shall be committed, and, upon conviction, shall forfeit a sum not exceeding twenty-five dollars, for the use and benefit of the school district in which such offence shall be committed. (*Sec.* 2, *chap.* 228 *of* 1845.)

No. 185. It shall be the duty of the trustees of any school district in which any such offence shall be committed to prosecute such offender before any officer having cognizance of such offence. (*Sec.* 3, *chap.* 228 *of* 1845.)

No. 186. If any person convicted of the offence herein prohibited shall not immediately pay the penalty incurred, with the costs of conviction, or give security, to the satisfaction of the officer before whom such conviction shall be had, for the payment of the said penalty and costs within twenty days thereafter, he shall be committed by warrant to the common jail of the county until the same be paid, or for such term, not exceeding thirty days, as shall be specified in such warrant. (*Sec.* 4, *chap.* 228 *of* 1845.)

No. 187. It shall and may be lawful for any person who may be complained of for a violation of the provisions of this act to demand of such magistrate that he may be tried by a

jury. Upon such demand, it shall be the duty of such officer to issue a venire to the proper officer, commanding him to summon the same number of jurors, and in the same manner, and the said court shall proceed to empannel a jury for the trial of said cause, in the same manner and subject to all the rules and regulations prescribed in the act providing for the trials by jury in courts of special sessions. (*Sec.* 5, *chap.* 228 *of* 1845.)

No. 188. All such provisions of law as are repugnant to or inconsistent with the provisions of this title are hereby repealed; but nothing herein contained shall be so construed as to impair or affect any of the local provisions respecting the organization and management of schools in any of the incorporated cities or villages or towns of this state, except as the same are affected by the preceding sections of this act. (*Sec.* 150, *chap.* 480 *of* 1847.)

The act of 1851, to establish free schools throughout the state, chap. 151, § 8, has a similar saying of all special acts relating to schools in any of the incorporated cities or villages of the state, except so far as they are inconsistent with the first (*No.* 149, *ante*), second, third and fourth sections thereof. The latter sections, which relate to the amount of the state tax for schools, and mode of distributing its proceeds, have been superseded by Nos. 25 to 32, inclusive.

No. 189. If any person, for gambling purposes, shall keep or exhibit any gambling table, establishment, device or apparatus, or if any person or persons shall be guilty of dealing "faro" or banking for others to deal "faro," or acting as "look-out" or game-keeper for the game of "faro" or any other banking game, where money or property is dependent on the result, or if any person shall sell or vend what are commonly known as or are called lottery policies, or any writing, card, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or if any person shall endorse a book or any other document for the purpose of enabling others to sell or vend lottery policies, he shall be taken and held as a common gambler, and, upon conviction thereof, shall be sentenced to not less than ten days' hard labor in the penitentiary, or not more than two years hard labor in the state prison, and be fined in any sum not more than one thousand

dollars, to be paid into the county treasury where such conviction shall take place, for the use of the common schools therein, to be divided among the school districts in that county, in the same manner as the school money of the state is divided among said districts, and in default thereof shall remain imprisoned until such fine be remitted or paid. (*Sec.* 2, *chap.* 504 *of* 1851, *as amended by chap.* 214 *of* 1855.)

UNION FREE SCHOOL LAW.

No. 190. Whenever fifteen persons, entitled to vote at any meeting of the inhabitants of any school district in the state, shall sign a call for any such meeting, to be held for the purpose of determining, by a vote of such district, whether an union free school shall be established therein, in conformity with the provisions of this act, it shall be the duty of the trustees of such district, within ten days after such call shall have been presented to them, to give public notice that a meeting of the inhabitants of such district, entitled to vote thereat, will be held for such purpose as aforesaid, at the school-house, or other more suitable place, in such district, at a day and hour in such notice to be specified, not more than twenty days after the publication of such notice. The qualifications of such inhabitants, entitled to vote at such meeting as now by law expressed, shall be sufficiently set forth in the several notices aforesaid. (*Sec.* 1, *chap.* 433 *of* 1853.)

This act is entitled "An act to provide for the establishment of union free schools." The above section relates to the measures for introducing the system which it establishes into a *single* district, while a subsequent one provides for the consolidation of districts for that purpose. The form of the call by the inhabitants may be as follows: "The undersigned, inhabitants of School District No. , in the town of , entitled to vote at any meetings of the inhabitants of said district, hereby call for a meeting, to be held for the purpose of determining by a vote of such district whether an union free school shall be established therein, in conformity to the provisions of chap. 433 of the Laws of 1853."

This, being first signed by at least fifteen qualified voters, should be delivered to the trustees. The notice to be given by the trustees should consist, first, of a copy of the call and of the signatures thereto, after which the notice should proceed as follows:

"The undersigned, trustees of School District No. , in the town of , in compliance with a call of fifteen (or, more than fifteen) persons, entitled to vote at any meeting of the inhabitants of said district, of which the above is a copy, hereby give notice that a meeting of the inhabitants of said district, entitled to vote thereat, viz., every male person of full age, residing therein, and entitled to hold lands in this state, who owns or hires real property in such district, subject to taxation for school purposes; every resident of such district authorized to vote at town meetings of the town of (in a joint district, say either of the towns, of , or), and who has paid any rate bill for teachers' wages in said district within one year preceding the day of (the date of the *meeting*, not of the notice), or who owns any personal property liable to be taxed for school purposes in said district exceeding fifty dollars in value, exclusive of such as is exempt from execution, will be held at (the school-house, or other more suitable place) on the day of next, at o'clock in the noon, for the purpose of determining by a vote of such district whether an union free school shall be established therein, in conformity to the provisions of chap. 433 of the Laws of 1853. Dated this day of , 185 .

(signed) A. B., C. D., E. F., *Trustees of District No. in the town of* ."

The day to be specified in the notice must be not more than twenty days after the first posting of the notices. The statute appears to require the posting of the *original* call of the inhabitants and notice of the trustees, and at least five copies thereof in addition; and, also, that a taxable inhabitant, designated by the trustees, shall be required to give personal notice, in the manner provided by No. 82, *ante*. His failure to do so, in full, would expose him to a penalty of $5, but would not necessarily invalidate the proceedings of the meeting.

No. 191. The notices aforesaid, and at least five written or printed copies thereof, shall be severally posted at various conspicuous places in, and may also be published in any newspaper circulating within such districts. The trustees of any such district shall authorize and require any taxable inhabitant of the same to notify every other inhabitant (qualified to vote as aforesaid) of such meeting, to be called as aforesaid, who shall give such notification in the manner,

and subject to the penalty, by law provided in the case of the formation of new school districts. (*Sec.* 2, *chap.* 433 *of* 1853.)

No. 192. The reasonable expense of such notices and of their publication and service shall be chargeable upon the district, in case an union free school is established therein under the provisions of this act, to be levied and collected upon and from the said district by the trustees, as in cases of taxes now levied for school purposes; and if in the event such union free school shall not be established, then the said expense shall be chargeable upon the inhabitants signing the call, jointly and severally, to be sued for if necessary in any court having jurisdiction of the same. (*Sec.* 3, *chap.* 433 *of* 1853.)

No. 193. Whenever fifteen persons, entitled as aforesaid, from each of two or more adjoining districts shall unite in a call for the consolidation of the same, and also for a meeting of the inhabitants entitled to vote, as aforesaid, in such districts to determine whether an union free school shall be established within the limits of such districts, pursuant to the provisions of this act, it shall be the duty of the trustees of such districts, or a majority of them, to give like public notice of such meeting, at some convenient place within such districts, and as central as may be, within the time and to be published in the manner set forth in the foregoing section, in each of said districts. The reasonable expenses of said notices and their service, in each of said districts, to be chargeable upon them in equal shares, or on the inhabitants signing the several calls therein, as by the foregoing section is provided. (*Sec.* 4, *chap.* 433 *of* 1853.)

The form of the call under this section may be same as that above given under No. 190, except that it should expressly call "for the consolidation of said districts (the numbers of which will be previously stated) and for a meeting," &c. It must be signed by at least thirty, or, if it is proposed to consolidate three districts, by forty-five persons, fifteen of whom must be qualified voters in *each* of the districts. The trustees of *each* district should appoint a taxable inhabitant to give personal notice therein; and an original and five copies of the call and notice should be posted in each of the districts, signed by a majority of the board composed of the trustees of all the districts to which the notice relates. The place of meeting may be in either district. It is

important that the original call and notices should be preserved, to be filed with the certified copy of the minutes in the county clerk's office. If the proposed consolidated district includes parts of more than one county, the call and notices should be signed in duplicate.

No. 194. Any such meeting, to be held as aforesaid, shall be organized by the appointment of a chairman and secretary, and may be adjourned from time to time if deemed by a majority vote expedient, provided any such adjournment shall not be for a longer period than ten days; and at any such meeting, where at least one-third of such inhabitants of such district are present, whenever the question whether an union free school shall be established, in pursuance of the call for such meeting, shall be determined by a two-third vote of those present and entitled to vote, as aforesaid, in the affirmative, it shall then be lawful for such meeting to proceed to the election, by ballot, of not less than three nor more than nine trustees, who shall, by the order of such meeting, be divided into three several classes, the first class to hold for one, the second for two, and the third for three years; and thereupon the office of any existing board of trustees shall cease. The said trustees and their successors in office shall constitute a board of education of and for the city, village, district or districts for which they are elected, and the designation of the place, whether as of such city, village or school district number , in the town of , or of consolidated school districts numbers and , in the town of , shall be comprised in the title of said board, and the said board shall have the name and style of the board of education of (adding the designation aforesaid). Copies of the said call, minutes of said meeting or meetings, duly certified by the chairman and secretary thereof, shall be by them or either of them transmitted and deposited, one to and with the town clerk, one to and with the clerk of the county in which said districts are located, and one to and with the State Superintendent; but when at any such meetings the question as to the establishment of an union free school shall not be decided in the affirmative, as aforesaid, then all further proceedings at such meeting, except a motion to reconsider or adjourn, shall be dispensed with, and no such meeting shall be again called within one year thereafter. (*Sec.* 5, *chap.* 433 *of* 1853.)

It is important that it should appear from the proceedings of the meeting that at least one-third of the inhabitants of *each* district con-

cerned are present. For this purpose, as soon as the meeting is organized by the election of a chairman and secretary, the clerk of each district or the inhabitant required to give notice therein should make a return, specifying the names of the voters in his district, which should be read by the secretary, and the names of those present from each district entered upon his minutes.

The numbers and constitution of the meeting being thus ascertained, and found to be sufficient to give jurisdiction of the subject, the question should be brought before it by a resolution that "a union free school be established within the limits of Districts No. , in the town of , and No. , in the town of , pursuant to the provisions of chap. 433 of the Laws of 1853." The meeting may adjourn from time to time by the vote of a majority of those present, although less than one-third of the inhabitants, for not more than ten days at each time. At any such adjourned session the question may be taken, on the resolution above mentioned; but when it has once been decided in the negative, by failing to receive a two-third vote, no further proceedings are in order except a motion to adjourn without day or a motion to reconsider, which latter motion may be carried by a majority vote, and the session may then be adjourned. On the reconsideration, at the adjourned meeting, if the resolution should be again lost, all further proceedings are to be suspended.

If the resolution to establish a free school shall pass the meeting, it should next fix upon the number of trustees to constitute the board of education. As the statute has made no provision for subsequently increasing or diminishing the number of the board, it should not be fixed without mature deliberation. It may be a number not divisible by three, as five or seven, and in such case the meeting may divide them into unequal classes, by a resolution which should be adopted before proceeding to an election.

It *seems* to be the intent of this act — which is singularly wanting in perspicuity — that an annual meeting of the inhabitants should be held to elect trustees, as vacancies occur by the expiration of their office. The meeting should, before adjourning, appoint a time for the next annual election, except in the case provided for in the next section, and should annually repeat such appointment.

No. 195. Whenever said board of education shall be constituted for any district or districts whose limits correspond with those of any incorporated village or city, the three classes

shall hold jointly until the next charter election for such village or city, and their regular term of service as by the foregoing section shall be computed from the several days of such charter elections. And thereafter there shall be annually elected in such villages and cities, in the same manner as and upon the same ticket with the charter officers thereof, trustees of the said union free schools, to supply the places of those whose terms by the classification aforesaid are about to expire. The term of office of all trustees elected under the provisions of this act, after the first election as aforesaid, shall be three years. (*Sec.* 6, *chap.* 433 *of* 1853.)

No. 196. The said boards of education are hereby severally created bodies corporate; and each shall, at their first meeting, and at times thereafter fixed by their by-laws as for their annual meetings, elect one of their number president, another the clerk thereof, the latter of whom shall also be the general librarian for the district. In districts other than those whose limits correspond with those of any city or incorporated village, said board shall have power to appoint one of the taxable inhabitants of their district treasurer, and another collector of the moneys raised and to be raised within the same for school purposes, who shall severally hold such appointments for one year from the date thereof, and until others are appointed in their stead, unless sooner removed by the board for cause. Such treasurer and collector shall, severally, and within ten days after notice of the appointment, in writing, duly served upon them, and before entering upon the duties of their offices, execute and deliver to the said board of education a bond, with such sufficient penalty and sureties as the board may require, conditioned for the faithful discharge of the duties of their respective offices. And in case such bond shall not be given within the time specified, such offices shall thereby become vacant, and said board shall thereupon make other appointments to supply such vacancies. (*Sec.* 7, *chap.* 433 *of* 1853.)

The annual meeting, herein referred to, is the annual meeting of the board of education, not that of the inhabitants. In respect to the treasurer and collector, the statute evidently contemplates that neither of them shall be a member of the board. The bond to be given by those officers, which the board has no power to waive, should run to the board of education in its corporate name.

No. 197. The corporate authorities of any incorporated village or city, in which any such union free school shall be established, shall have power, and it shall be their duty, to raise from time to time by tax, to be levied upon all the real and personal property in said cities and villages respectively, as by law provided for the defraying of the expenses of their respective municipal governments, such sum or sums as the board of education established therein shall declare necessary (in a detailed statement, to be furnished in writing by the said board to such municipal authorities, of each and every expenditure so declared to be necessary) for the furtherance of any of the powers vested in them by law; provided, however, that the said corporate authorities shall have power to refuse for one year any supplies other than those for the annual support of the teachers of said union free schools, and the necessary contingent expenses of the said schools. And in case the said corporate authorities shall refuse, as aforesaid, they shall communicate in writing to the said board of education their objections to each and every expenditure which they may, under the power as aforesaid, refuse to allow; and thereupon, the said board of education shall cause the said communication to be published six times in at least one paper circulating in said village or city. Nothing in this section contained shall be construed to prohibit any such municipal government of any city or village from reconsidering their vote in regard to the refusal of any such supplies, as aforesaid, within the year above specified. (*Sec.* 8, *chap.* 433 *of* 1853.)

This section, doubtless, is applicable to those villages and cities only who correspond in their limits with an union free school district, as described in § 6. The above section denies by implication the power of the city or village corporate authorities to refuse supplies "for the annual support of the teachers of said union free schools, and the necessary contingent expenses of said schools."

The salaries of the teachers are by a subsequent section to be fixed by the board of education, and the general school law requires schools to be maintained for at least six months. The decision of the supreme court of Massachusetts (*Batchelder* v. *City of Salem*, 4 *Cushing*, 602) is an authority for the position that the teachers might maintain an action against the village or city for the amount of six months' wages at the rate fixed by their contract with the board of education. The

framers of our statute seem to have designed that the school should be maintained during the whole year; but in this as in various other particulars the union free school law is not only ambiguous as to its purpose, but deficient in prescribing the means by which it is to be effected.

By "the necessary contingent expenses of said schools," the framers of the act probably meant all those expenses which are necessary to keep the ordinary machinery of education at work, without making improvements or permanent additions to it, such as the cost of warming, lighting, cleaning and repairing the school buildings, and renewing the necessary annual decay and wear of their furniture and apparatus. The act is open to the construction that it is within the discretion of the village authorities to determine what are necessary contingent expenses.

No. 198. The taxable inhabitants of any districts, as aforesaid, other than those whose limits correspond with those of any city or incorporated village, at any annual or special meeting, held as by provisions of existing law, may vote to authorize such acts and raise such sums of money as they shall deem expedient for the purpose of making additions, alterations or improvements, with reference to site or structures, in the academy or union free school buildings, or of buying apparatus or fixtures, or for such other purpose as they may by a two-third vote approve; and to direct the trustees to cause the sums voted to be levied and raised by instalments or directly by a tax; and such trustees shall make out a tax list, in the manner by law provided in cases of school district taxes, and direct such taxes or such instalments to be collected at the times they shall become due. And the inhabitants of such districts shall have no power to rescind the vote to raise such money, or to reduce the amount at any subsequent meeting, unless the same be done within ten days after the same shall have been first voted. (*Sec.* 9, *chap.* 433 *of* 1853.)

This section must be understood as intending to confer upon the inhabitants, assembled in district meeting, powers additional to those which they would have possessed under the general law, if they had not organized a free school district. It gives them the power to raise such sums as they may deem expedient, without limitation as to the amount for making additions and improvements to sites, buildings, fixtures and apparatus. These are mere investments of money for permanent objects, which remain as a part of the *capital* of the district, and are in their nature different from those expenditures which disappear

in the using, and leave nothing behind capable of sale, and thereby of replacing their original cost. There is no reason in law or in the grammatical construction of the act for supposing that, in regard to raising money for these specially enumerated objects, any other rule is to prevail than that of the common law, which makes a majority vote equivalent to a unanimous one.

The section proceeds to confer an additional power to raise money "for such other purpose as they may by a two-third vote approve." It imposes no express limitation, and none can be raised by intendment, other than that those purposes must be in furtherance of the general objects of the corporation. There can be no doubt that by a two-third vote, the meeting may authorize the trustees to levy a tax to pay the teachers, so as to dispense with any rate bills. Whether, independent of such vote, it was the intent of the law that rate bills should be collected for tuition, is a question that admits of much argument without a satisfactory conclusion. It speaks throughout of *free* schools. The question at the organization is "whether an union free school shall be established?" and to carry this requires a two-third vote, which may be regarded as the approval of the purpose of all taxes necessary to make the school free. Our standard lexicographer gives, as a definition of this adjective, "open to all, without restriction or expense, as a *free* school." Nevertheless, there are passages in the act from which the power of the board to levy a rate bill may be plausibly inferred. The question must wait for judicial determination or further legislation.

In the vote authorizing a tax, the inhabitants may direct at what time and by what instalments it shall be raised. The sums and periods may be equal or unequal in their discretion.

No. 199. Whenever any school districts shall have been consolidated as aforesaid, or by any provision of law, they shall be entitled to the same portion of the one-third of the public moneys, distributed among the several school districts, in pursuance of an act entitled "An act to establish free schools throughout the state," passed April 12, 1851, as they would have been entitled to if they had not been consolidated; provided that they shall not receive such portions for any longer period than for five years after the passage of this act, in the cases of all districts already consolidated, and in other cases for five years after such consolidation shall have been effected as aforesaid. (*Sec.* 10, *chap.* 433 *of* 1853.)

This section is in effect repealed by the provisions of No. 30 and No. 31, *ante*, for a different mode of distributing the district quotas. It would be well, nevertheless, for the school commissioners to give, in their reports, the date of the organization of every union free school or consolidated district.

No. 200. The said boards of education, by this act established, shall severally have power:

1. To pass such by-laws as they may deem proper for the regulation and exercise of their lawful business and powers;

2. To fill any vacancy which may happen in said board by reason of the death, removal or refusal to serve of any member or officer of said board; and the person so appointed, in the place of any such member of the board, shall hold his office until the next election of trustees, as by this act provided;

3. To remove any member of their board for official misconduct. But a written copy of all charges made, of such misconduct, shall be served upon him at least ten days before the time appointed for a hearing of the same; and he shall be allowed a full and fair opportunity to refute such charges before removal;

4. To take charge and possession of the school-houses, sites, lots, furniture, books, apparatus, and all school property within their respective districts; and the title of the same shall be vested respectively in said boards of education, and the same shall not be subject to taxation for any purpose;

5. To take and hold, and for the use of the said schools or of any department of the same, any real estate transferred to it by gift, grant, bequest or devise, or any gift, legacy or annuity, of whatever kind, given or bequeathed to the said board, and apply the same, or the interest or proceeds thereof, according to the instructions of the donor or testator;

6. To have, in all respects, the superintendence, management and control of said union free schools, and to establish in the same an academical department, whenever in their judgment the same is warranted by the demand for such instruction; to receive into said union free schools any pupils residing out of said districts, and to regulate and establish the tuition fees of such non-resident pupils in the several departments of said schools, and also those of scholars residing in said districts and attending its academical department; to regulate, in accordance with the provisions of this act, the

transfer of scholars from the primary to the academical departments, and from class to class, as their degree of scholarship may warrant; to direct what text books shall be used therein; to provide fuel, furniture, apparatus and other necessaries for the use of said schools, and to appoint such assistant librarians as they may, from time to time, deem necessary;

7. To contract with, license and employ teachers competent in the several departments of instruction, in all not less than one for every sixty scholars attending such schools; to remove them at any time for neglect of duty or immoral conduct, and to pay the wages of such teachers out of the moneys appropriated for that purpose;

8. And generally to possess all the powers and privileges, and be subject to all the duties in respect to the common schools, or the common school departments in any union free school in said districts, which the trustees of common schools now possess or are subject to, not inconsistent with the provisions of this act; and to enjoy, whenever an academical department shall be by them established, all the immunities and privileges now enjoyed by the academies of this state. (*Sec.* 11, *chap.* 433 *of* 1853.)

Such exposition as may be required of the power and duties of the board of education, under this section, will be found in the preceding pages under the similar provisions of the general law relating to the different school officers. Under the 8th subdivision it is the duty of the board of education to make an annual report to the school commissioner, and to submit an annual account to the inhabitants assembled in district meeting, in the same manner as the trustees of ordinary districts. Such reports should be adopted at a meeting of the board, and authenticated by the signature of its president and secretary.

No. 201. It shall be the duty of each of the said boards of education to have a regular meeting at least once in each quarter, and at such meetings to appoint one or more committees, each to consist of not less than three of their own number, to visit every school or department under the supervision of said board, and such committees shall visit all said schools at least twice in each quarter, and report at the next regular meeting of the board on the condition and prospects thereof. (*Sec.* 12, *chap.* 433 *of* 1853.)

No. 202. It shall also be the duty of said boards, respectively, to have reference in all their expenditures and contracts to the amount of moneys which shall be appropriated, or subject to their order or drafts, during the current year, and not to exceed that amount. And said boards shall severally apply all the public moneys apportioned to the common school districts under their charge to the departments below the academical; and all moneys from that of the literature fund or otherwise, appropriated for the support of the academical departments, to the latter departments. (*Sec.* 13, *chap.* 433 *of* 1853.)

No. 203. All moneys raised for the use of the union free schools in any city or incorporated village, or apportioned to the same from the income of the literature, common school or United States deposit funds, or otherwise, shall be paid into the treasury of such city or village, to the credit of the board of education therein; and the funds so received into such treasury shall be kept separate and distinct from any other funds received into the said treasury. And the officer having the charge thereof, shall give such additional security for the safe custody thereof as the corporate authorities of such city or village shall require. No money shall be drawn from such funds, credited to the several boards of education, unless in pursuance of a resolution or resolutions of said board, and on drafts drawn by the president and countersigned by the secretary, payable to the order of the person or persons entitled to receive such money, and stating on their face the purpose or service for which such moneys have been authorized to be paid by the said board of education. (*Sec.* 14, *chap.* 433 *of* 1853.)

No. 204. All moneys raised for the use of said union free schools, other than those whose limits correspond with those of any cities and incorporated villages, or apportioned from the income of the literature or common school or United States deposit funds, or otherwise, shall be paid to the respective treasurers of the said several boards of education entitled to receive the same, and be by them applied to the uses of said several boards, who shall annually render their accounts of all moneys received and expended by them for the use of said schools, with every voucher for the same, and certified copies of all orders of the said boards touching the same, to

the [school commissioner] of the town in which said districts are severally located. (*Sec.* 15, *chap.* 433 *of* 1853.)

No. 205. Every academical department, so as to be established as aforesaid, shall be under the visitation of the regents of the university, and shall be subject in its course of education and matters pertaining thereto (but not in reference to the buildings or erections in which the same is held, unless in cases where the buildings aforesaid are separate from those of the common school department) to all the regulations made in regard to academies by the said regents. In such departments, the qualifications for the entrance of any pupil shall be the same as those established by the said regents for admission into any academy of the state under their supervision. (*Sec* 16, *chap.* 433 *of* 1853.)

No. 206. Whenever an union school shall be established under the provisions of this act, and there shall exist within its district an academy, the trustees thereof may, by an unanimous vote, to be attested by their signatures and filed in the office of the clerk of the county, declare their offices vacant; and thereafter the trustees of such union school shall become the trustees of the said academy, and be charged with all the duties of the former trustees, and the said academy shall be regarded as the academical department of such union school. (*Sec.* 17, *chap.* 433 *of* 1853.)

Although the effect of this provision probably is to transfer to the trustees of the free school district all corporate property vested in the trustees of the academy, it will be prudent for the latter, in pursuance of a resolution to that effect adopted at a regular meeting, to execute a deed of all their corporate property to the board of education.

No. 207. All acts or parts of acts inconsistent with the provisions aforesaid are hereby repealed; and the provisions of this act, in reference to the establishment of academical departments, shall be as applicable to those school districts or villages where free schools have been established, by special charter, as if no such charter had been granted; but nothing in this act shall be construed to impair the charters or alter or abridge the rights or privileges of any free schools now by law established in any city of the state. (*Sec.* 18, *chap.* 433 *of* 1853.)

REAPPORTIONMENT OF UNEXPENDED MONEY.

No. 208. All moneys apportioned by the [school commissioners] to the trustees of a district, part of a district or separate neighborhood, which shall have remained in the hands of the [supervisor] for one year after such apportionment, by reason of the trustees neglecting or refusing to receive the same, shall be added to the moneys next thereafter to be apportioned by the [school commissioners], and shall be apportioned and paid therewith in the same manner. (*Sec.* 17, *chap.* 480 *of* 1847, *modified in conformity to Nos.* 32 *and* 50.)

The trustees, strictly speaking, receive nothing but library money. The payment of their orders, drawn in favor of teachers, must be regarded as equivalent to its reception by the trustees, in order to give any force to this section; and their neglect to exhaust the money, by such orders, as abandoning it for reapportionment among all the districts of the county. They are to draw such orders in payment for teachers' wages earned during the year in which the money was apportioned, and are required to report before the fifteenth day of January that all the money received has been so applied. A year "after the previous apportionment" does not expire, however, before the first Tuesday of April, and until it has expired the supervisor is at liberty to pay orders for teachers' wages earned previous to the first of January. It is his duty to report to the school commissioner in charge of the district to which his town belongs the amount of all sums then remaining unexpended in his hands, that it may be apportioned to the several districts of the county, and charged to such town as a partial payment of the sum to which it is entitled on the new apportionment. A comparison of the sum reported, as received by the trustees, with the amount apportioned to the district the previous year, will furnish the commissioners with information which ought to correspond with the report of the supervisor. If the trustees reports are correct, the commissioners will learn from them how much money is to be reapportioned, without waiting for the report of the supervisor.

INDEX.

ALIENS: PAGE.

When may hold office,..... 17
When qualified to vote,..... 81, 209

ANNUAL MEETING:

Time of,..... 3, 20, 103, 204
Elections at,..... 59, 218
Any business legal at,..... 63, 214
Surprise, good cause for ordering new meeting,..... 64, 75
Noticed for tenth and adjourned to eleventh, held to be legal,..... 94
Estimates of expenses must be submitted item by item,..... 94, 225
General powers,..... 213

ANNUAL REPORTS OF TRUSTEES, pages 301 to 317:

Time when to be made,..... 301
What to contain,..... 302
Form of, and to whom made,..... 304
Children at poor-house and asylums,..... 306
Enumeration of children,..... 307
Indian children,..... 308
Reports for joint districts,..... 312
" for separate neighborhood,..... 312
Penalty for false reports,..... 313

APPEALS, pages 317 to 324:

Jurisdiction of school department,..... 12, 43, 72, 318
Operates as stay of proceedings,..... 70
Letters, and ex parte applications,..... 321
Rules respecting appeals,..... 322

APPORTIONMENT OF SCHOOL MONEYS:

State tax,..... 120
Common school fund,..... 120
United States deposit fund,..... 120
School moneys, how to be expended,..... 121
Library money,..... 121
Salaries of school commissioners,..... 122
Mode of one-third apportionment to districts,..... 122
Districts entitled to draw money,..... 124
Districts, number to be enumerated,..... 125
Two-third apportionment by population,..... 127
Defective census, how supplied,..... 137
Clerks of supervisors to report to State Supt. the county valuations,... 137
Reapportionment of unexpended money,..... 360

PAGE.

ARBITRATION:

Claims may be settled by,..... 22, 246

ASSESSMENT:

Notice, when required,..... 17, 44, 73, 284
Non-resident land, roll guide to valuation, not to liability,..... 93
See title "Tax."

ASSESSMENT ROLL:

When deemed complete,..... 104
Valuations, how ascertained,..... 282

ASSESSMENT AND COLLECTION OF TAXES, pages 267 to 301:

Real estate,..... 267
Personal property,..... 268
Non-residents, debts due to,..... 271
Land, real estate and real property,..... 268
Property of temporary sojourners,..... 268
Property exempt,..... 269
Rents reserved,..... 270
Land of non-residents,..... 272, 276
Land worked by contract,..... 273
Land worked by agent,..... 275
Tenant at will,..... 276
Return of land for unpaid taxes,..... 277
Certificate of trustees,..... 278
Board of supervisors,..... 279, 280
County treasurer,..... 279
Owner of land may pay,..... 280
Land in two or more towns,..... 281
Certificate of equalization,..... 281
Valuations, how ascertained,..... 282
Reduction, when to be allowed,..... 284
Claim of reduction,..... 286
Exemption from tax for building house,..... 287
Tax list, when to be made out,..... 287
Form of tax list,..... 289
Warrant to collector,..... 290
Delivery of warrant,..... 291
Suits against collector,..... 294
Levy and collection,..... 296
Renewal of warrant,..... 298, 300

BAIL:

Of collector, cannot be released,..... 22

BLIND:

Selection of pupils,..... 116

BOARD OF TEACHERS:

How to be provided for,..... 3, 248

BOARDS OF SUPERVISORS:

State tax,..... 120
Clerk to transmit valuation to superintendent,..... 137

PAGE.

Salaries of school commissioners,..... 183
Auditing accounts of commissioners,..... 183
Unpaid taxes,..... 279
Costs and charges of district officers,..... 339

BUILDING COMMITTEE:

Agents of trustees,..... 11, 66, 246

CERTIFICATE:

Annulled for cruelty,..... 18, 35
Notice of intention to annul,..... 24, 172
Annulling of, ends contract to teach,..... 36
Examination for,..... 97
Forms,..... 168
Annulling,..... 171

CHAIRMAN OF MEETING:

His right to vote,..... 68, 215

CHARITABLE INSTITUTIONS:

Selection of pupils,..... 115

CHILDREN:

Enumeration of,..... 16, 23, 38, 306, 307
School age of,..... 309
Non-resident,..... 100, 254, 310
Colored, schools for,..... 343

CLERK:

Elected trustee, vacates clerkship,..... 5
Notice to call meeting may be verbal,..... 42
Cannot employ another to give notices,..... 43
Powers and duties,..... 240

CLERK OF SUPERVISORS:

Transmit valuation to State Superintendent,..... 137

COLLECTOR:

Must obey warrant; neglect finable, and bail cannot be released,..... 22
Delivery of warrant to,..... 291
Fees,..... 291
Penalty for neglect,..... 293
Return of,..... 293
Bond, form of,..... 295
Execution of warrant,..... 294, 298
Force of warrant,..... 293

COMMISSIONERS:

Cannot declare void proceedings of predecessors,..... 1
Consent to additional site,..... 103
Consent to raise tax over $400,..... 12, 229
General duties,..... 156 to 179
See title "School Commissioners."

PAGE.

COMMON SCHOOLS:
Free, to whom,.... 310

COMMON SCHOOL FUND:
Income,.... 120

CONSOLIDATION OF DISTRICTS:
Rules to govern,.... 57, 58

CONTINGENT EXPENSES:
Tax for, illegal,.... 3, 225

COSTS:
When tax may be raised to pay,.... 23, 339
Under chapter 214, Laws of 1847,.... 43, 72

COUNTY TREASURER:
Not entitled to per centage,.... 9
When to apply for school moneys,.... 141
Notice to supervisors,.... 141
Commission of one per cent,.... 142
To pay unpaid taxes,.... 279

DEAF AND DUMB:
Selection of pupils,.... 115

DISMISSAL FROM SCHOOL:
On what grounds,.... 3, 311

DISTRIBUTION OF SCHOOL MONEYS:
School moneys to be paid into state treasury,.... 138
How transferred,.... 138
How drawn from the treasury,.... 139
When to be drawn,.... 139
For what cause to be withheld,.... 133, 140
County treasurer to draw for,.... 141
Notice to supervisors of towns,.... 141
Bond to be taken from supervisors,.... 142

DISTRICT, DIVISION OF:
Effect upon officers,.... 5
Size of new districts,.... 57
Alteration of,.... 98, 194
See titles "School District" and "Meetings."

DISTRICT MEETINGS AND DISTRICT OFFICERS:
Pages.... 199 to 239
First meeting of new district,.... 199
Notice of,.... 200
Notice, how served,.... 202
Penalty for neglect to serve notice,.... 203
Notice, what to contain,.... 204
Annual meetings,.... 204

PAGE.
Special meetings,... 206
Residence defined,... 207
Voters at district meetings,... 209
Penalty for illegal voting,... 212
General powers of district meeting,... 213
Challenge of votes,... 214
Appointment of chairman,... 265
Choice of officers,... 211
Designation of site,... 218, 228
Levying taxes,... 221, 234
Alteration and repeal of proceedings,... 225
Book of records,... 227
Tax for more than $400,... 229
Tax by instalments,... 231
Change of site,... 232
Sale of old site,... 233
Proceeds of sale, how applied,... 234
Deficiencies on tax lists and rate bills,... 234
Tax of $10 for library,... 235
Library money for purchase of books,... 236
Classification and term of office of trustees,... 236
Term of office under appointment,... 237
Vacancies in office, how filled,... 105, 238
Penalty for refusing or neglecting to serve,... 239
Resignations, to whom made,... 239

ELECTION OF OFFICERS:

Cannot be rescinded by adjourned meeting,... 1, 16
When set aside,... 16
Minor elected, how displaced,... 45
Person elected, cannot be removed on a collateral issue,... 45, 74
At adjourned meeting, valid,... 102
Choice of officers,... 216

ENUMERATION OF CHILDREN:

Of temporary residents,... 16, 38
Boarders,... 23, 308
Of residents,... 306
Indians,... 308

EXEMPTION:

Duty of trustees,... 31, 69
From tax, to build school-house,... 40, 287
Ministers exempt from tax,... 62, 274
Must be collected by tax,... 105
Indigent persons,... 252

FORMATION AND ALTERATION OF SCHOOL DISTRICTS:

Pages... 185 to 199
General rules,... 185
Form of order,... 186
Association of supervisor and town clerk,... 188
Notice to trustees,... 190
Joint districts,... 191, 194
Orders, when to take effect,... 193
Consolidation,... 195

PAGE.

Moneys of annulled districts,..... 197
Collection of tax lists or rate bills of annulled and dissolved districts,.. 198

FORMS:

Notice of application to remove officer,..... 112
Apportionment for teachers' wages,..... 135
Certificate of apportionment to supervisor,..... 136
Bond to treasurers for towns,..... 143
Account of supervisors,..... 148
Taking and reporting testimony,..... 183
Order for formation of district,..... 186
Notice to trustees,..... 190
Joint districts, ... 191, 194
Notice of first meeting, ... 200
Contract with teacher,..... 249
Order upon supervisor for teachers' wages,..... 251
Certificate of exemptions,..... 253
Rate bill and warrant,..... 257
Teacher's list of daily attendance,..... 263
List for term attendance,..... 264
Abstract for the year,..... 265
Return of land for unpaid taxes,..... 277
Certificate of trustees to treasurer,..... 279
Treasurer to pay unpaid taxes,..... 279
Certificate of equalization in joint districts,..... 281
Notice of completion of tax list,..... 285
Tax list,..... 289
Warrant to collector,..... 290
Return of collector,..... 293
Bond of collector,..... 295
Renewal of warrant,..... 298, 300
Annual report of trustees,..... 304
Order of board of supervisors to levy tax for costs and charges of trustees, 342
Call for meeting to form union free school,..... 348
Vouchers of supervisor,..... 149
Certificates of teachers,..... 168

FUEL:

How provided,..... 260

GAMBLING:

Fines for, a part of school money,..... 346

ILLEGAL VOTING:

When proceedings will be set aside for,..... 2, 212, 228

INDIAN SCHOOLS:

How supported,..... 114

INDIGENT PERSONS:

Trustees to exempt,..... 31, 69
Exempt from rate bill,..... 252

INSTALMENTS:

Tax by,..... 67, 79 99, 230

JOINT DISTRICTS: PAGE.
Alteration and dissolution of, ... 8, 71, 191, 194
Order for alteration must show on its face the presence of proper officers, 50

LEASE OF SITE:
On what terms, ... 3, 32
Lease, when authorized, ... 245

LIBRARY:
American books, ... 335
What part may be sold, ... 6, 196
Tax of $10 for increase of, ... 235
Laws and rules respecting, ... 325
When superintendent may select, ... 335

LIBRARY MONEY:
When to be expended, ... 41
For teachers' wages, ... 41, 236

LIBRARIAN:
His duties, ... 328

MEETINGS:
Power to appropriate public moneys, ... 2
How many voters constitute a meeting, ... 6, 10, 20, 59
When trustees bound to call, ... 9, 20, 77
Power to raise taxes, ... 15, 19, 229
Adjourned meetings cannot displace officers, ... 16, 19
May prescribe terms of contract, ... 17, 246
Annual, when to be held, ... 20, 21, 103, 204
Cannot excuse trustees for neglect to report and pay over balance, ... 25
Cannot employ or dismiss teacher, ... 38
Cannot annul district, ... 42
Questions of order, ... 42, 90, 226
Legal, though order to call was verbal, ... 43
Illegal proceedings set aside only on appeal, ... 55
Notice of object of annual meeting not necessary, ... 63, 103
Surprise, cause for setting aside proceedings, ... 64, 75
Change of site by, ... 65, 232
Legal voters at, ... 67, 68, 209
Chairman's right to vote, ... 68
Special, object must be stated, ... 86, 214
Powers of district meetings, ... 199, 239
Annual meetings, ... 103, 204
Special meetings, ... 206
General powers of meetings, ... 213
Additional site, ... 103, 228
See title "Annual Meetings" and "District."

MINISTERS OF GOSPEL:
Exempt from tax, ... 62, 274

MONTH:
Twenty-six days being specified, teacher allowed Saturday afternoon or alternate Saturdays; month's work, ... 37, 125

MORTGAGE: PAGE.
Money due on, who taxable,..... 39

MOTIONS:
Chairman must put,..... 42, 215

NEW DISTRICT:
Officers of,..... 5, 199

NON-RESIDENT CHILDREN:
Terms of admission to school,..... 1, 10, 56, 100
Tuition of,..... 45, 95, 255

NOTICES OF ALTERATION:
On whom to be served,..... 1, 2, 188
Must be given before order can take effect,..... 8, 193

NOTICE OF MEETING:
Verbal, sufficient,..... 2, 43
Must be given by clerk himself,..... 43, 240
Twenty days' notice of new valuation,..... 44, 73, 285
Object of annual meeting need not be specified,..... 63
Due notice presumed,..... 95
Annual meeting,..... 200
Trustees to order notices,..... 244

OFFICERS OF SCHOOL DISTRICTS:
Acts regular till appealed from,..... 46
Removal of, for cause,..... 58, 62, 112
Right to hold office will not be inquired into collaterally,..... 45, 74
Choice of,..... 216

OLD SCHOOL-HOUSE:
Avails of sale, how to be applied,..... 234

ORDER:
Void in part and valid in part,..... 8
For alteration, when to take effect,..... 8, 193
Unrecorded, good after five years,..... 79
Order to draw money by two trustees,..... 88

PENALTIES:
For neglect or violation of duty,..... 338
For disturbing schools,..... 344
For gambling, to whom paid,..... 346

PRAYERS:
School may be opened with,..... 4

POWERS AND DUTIES:
Of State Superintendent,..... 109 to 119, 335
Of trustees,..... 241 to 267
Of district meetings and officers,..... 199 to 239

PAGE.

Of school commissioners, ... 156 to 179
Supervisors, ... 145 to 154
District clerk, ... 240
Town clerk, ... 184
Collector, ... 291 to 295
County treasurer, ... 141
Clerk of supervisors, ... 137

PUBLIC MONEY:

When to be expended, ... 2, 78, 360
To whom to be paid, ... 3, 62 82
How divided between towns, ... 11, 17, 48, 52, 85
Wages for winter term, ... 17
In reduction of rate bill, ... 47
Must be paid over to officers *de facto*, ... 61
Apportionment of, ... 120 to 127, 360
Distribution of, ... 138 to 142

PUBLIC MONEY:

When forfeited, may be restored by State Superintendent, ... 335
Not expended by district, to be reapportioned, ... 360

PUNISHMENT:

Cruelty reprehended, ... 18, 311

RATE BILL:

To pay teachers for different terms, ... 48, 52, 78
Legal only for teachers' wages, ... 49
Exemptions, ... 31, 69
Deficiencies, ... 234
How assessed, ... 254
Property exempt from, ... 211, 259

REAL ESTATE:

Lying in two districts, how taxable, ... 40, 273
Land worked by contract, ... 100
Possession defined, ... 274
Exemptions, ... 62, 287

REAPPORTIONMENT:

Of moneys unexpended, ... 360

RE-ELECTION OF TRUSTEE RESIGNED:

Cannot be made against his will, ... 2

REPEAL:

General repealing section, ... 346

REPORTS:

Of trustees, children of temporary residents, ... 16, 38
What children to be enumerated, ... 23
State Superintendent's annual report, ... 110
Of trustees, when to be made, ... 301
Of school commissioners, ... 180

RESOLUTION: PAGE.
Effect of subsequent resolution,..... 6, 226

RESIDENCE:
How gained or lost,..... 49, 91, 209
What constitutes,..... 207

SCHOOL:
When trustees bound to open,..... 5
Branch schools,..... 73, 255
For colored children,..... 343
Disturbance of,..... 344

SCHOOL COMMISSIONERS:
Election,..... 154 to 156
Jurisdiction,..... 156
General duties,..... 156 to 179
Visitation of schools,..... 158
Advising with trustees,..... 159
Advising with other officers,..... 160
Resignations,..... 180
Filling of vacancies,..... 180
Report to State Superintendent,..... 180
Taking affidavits and oaths,..... 181
Taking testimony,..... 181
Forms,..... 182
Salaries and accounts,..... 122, 144, 183
City superintendents,..... 184
Formation and alteration of districts,..... 185
Notice to trustees,..... 190
Examination of teachers,..... 165
Certificates of teachers,..... 168
Annulling certificates,..... 171
Notice to teacher of intention to annul,..... 173
Order of annulment,..... 173
Teachers' institutes,..... 175
Not to be trustee,..... 217

SCHOOL DISTRICT:
Cannot borrow money,..... 3
Dissolution is not alteration,..... 6
Designation of site,..... 6
Dissolution of joint districts,..... 8
Establishment by appeal final,..... 9, 87
Consent to alteration,..... 10
Alteration,..... 19, 71, 74, 79, 88, 89, 91, 96
Power to levy taxes,..... 19
For uncollected rate bills,..... 19, 234
Size of new districts,..... 57
Consolidation of,..... 57, 58
Must be formed of contiguous territory,..... 80
Formation and alteration of,..... 185

SCHOOL DISTRICT LIBRARIES:
Rules respecting,..... 325

SCHOOL-HOUSE: PAGE.
Joint use, when allowable,..... 3, 223
Stove and pipe, appendages to,..... 61
Purposes for which it is to be used,..... 70, 246
Repair of,..... 259

SITE OF SCHOOL-HOUSE:
Designation of,..... 6, 76, 103
Title, occupancy good notice to purchasers,..... 7
Perpetual rent for, will not be permitted,..... 32
Must be described by metes and bounds,..... 33
When trustees have located school-house, department will not interfere, 34
Purchase of additional grounds not a change of site,..... 34, 62
Amount of purchase money not limited, and certificate not necessary,.. 41
Purchase of site,..... 54, 62, 98, 245
Change of, by what vote,..... 65, 231
Tax for, not raised by instalments,..... 79
Additional site,..... 103
Sale of old site,..... 233
Proceeds of sale, how applied,..... 234

SPECIAL MEETINGS:
How called,..... 9, 20, 77, 244

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION:
Powers and duties,..... 109 to 119
His election and term of office,..... 109
Salary,..... 109
Clerk hire,..... 109
Seal of office,..... 110
Exemplification and copies of papers,..... 110
Visitation and inspection of schools,..... 110
Annual report,..... 110
Regent of university, *ex officio*,..... 111
County visitors,..... 111
State certificates,..... 111
Removals from office of school officers,..... 112
Indian schools,..... 114
Charitable institutions,..... 115
Overseers of poor to report deaf and dumb,..... 115
Selection of deaf and dumb pupils,..... 115
Selection of blind,..... 117
Forms and instructions,..... 119
Duty in case of defective census,..... 137
Appeals,..... 317
Selection of district libraries,..... 335
Apportionment of school moneys,..... 120 to 127
" of forfeited moneys,..... 335

STATE TAX:
How raised,..... 120

STAY OF PROCEEDINGS:
Appeal operates as,..... 70

SUITS AGAINST DISTRICT OFFICERS: PAGE.

Pages ..... 338 to 342
Costs of suits,..... 338
Tax for costs and expenses,..... 339
Amount of costs and charges, how ascertained, ... 340

SUPERVISORS:

Custody and disbursement of money,..... 145 to 154
Supervisors to receive money from treasurers,..... 145
Form of bond to treasurer for towns, ... 143
Penalty for embezzlement, ... 146
Disbursing and accounting for moneys,..... 146
Accounting to successors, ... 148
Town school fund, ... 150
Moneys from overseers of the poor,..... 152
Alteration of school districts, ... 185

SUPERVISOR:

May be trustee,..... 47
Board for alteration,..... 19, 71, 74, 88, 91, 96
Suits against, for school moneys,..... 301
Suits for penalties, against trustees, ... 149, 316, 317
Forms of vouchers,..... 149

TAX:

For building school-house,..... 1, 7, 98, 229
For contingent expenses, erroneous, ... 3
Note cannot be received in payment,..... 7
For more than $400, to build house,..... 12, 79, 99
To pay legal costs, ... 23
When levied without vote of district,..... 27, 50
Money due on mortgage,..... 39
For building school-house, who exempt from, ... 40
For purchase of site, not limited in amount,..... 41, 54
For stove and pipe, legal,..... 61
Ministers of gospel exempt,..... 62
For site, not raised by instalments,..... 79, 99
Items of expenditure,..... 94
Tax by instalments,..... 67, 79, 99, 229
Deficiencies,..... 234
For repairs,..... 259
For fuel,..... 260
Tax, without vote of district,..... 266
Possession defined,..... 274
Equalization of taxes,..... 281

TAX LIST:

When to be made out,..... 22, 287
Correction, after part collected, ... 26, 300
Must include all taxable inhabitants,..... 29, 39, 93
Contiguous territory, ... 40, 93
Tax list not having been delivered to collector, the vote to raise it may be rescinded,..... 55
Notice that it is in collector's hands unnecessary,..... 73
In making out, all the trustees must be consulted and act together,. 95, 244
Deficiencies,..... 234
Property exempt from,..... 211, 259

PAGE.

What to include,..... 39, 267
Possession defined,..... 274

TEACHER:

How to be paid,..... 3, 82
Wages, debt cannot be offset against,..... 3, 251
Dismissal of,..... 10
Improperly dismissed, entitled to full wages,..... 15
Certificate annulled for cruelty,..... 18, 35
Notice of intention to annul,..... 24
Legal employment of,..... 27
Annulment of certificate ends contract to teach,..... 36
Saturdays,..... 37
Can be employed only by trustees,..... 38
Employed by one trustee, report of others, when implied,..... 80, 82
Examination for license,..... 97, 165

TEACHER'S LIST:

Teacher not keeping, cannot recover his wages,..... 2, 263

TEACHERS' INSTITUTE:

Conduct of,..... 175

TOWN CLERK:

Board for alteration,..... 19, 71, 74, 88 96
General duties,..... 184
Alteration of school districts,..... 188
Notice of annual meeting,..... 205

TOWN SUPERINTENDENTS:

Towns transferred,..... 179

TRUSTEES:

Corporation to hold district property,..... 313
Cannot be librarian or collector,..... 7
De facto, how far acts are binding,..... 11
Appointment of, set aside for fraud,..... 25
Annual account and payment of balance,..... 25, 102, 314, 315, 316
Correction of tax list,..... 26
Employment of teacher,..... 27, 80, 82, 99
Have no lien on moneys for expenses,..... 27
Notice to all, and concurrence of a majority necessary to validity of acts, 28
Have sole power of making contracts for district,..... 29, 66
Have sole executive authority,..... 30
Have sole power to employ teacher,..... 38, 80, 82, 99
May be elected supervisor,..... 47
Division of public money,..... 11, 17, 48, 52, 78, 85
Levying taxes without vote,..... 50, 266
What absence will amount to vacancy,..... 51, 53
No power to set aside proceedings of a meeting,..... 55
Admission of non-resident children,..... 10, 45, 56, 95, 100, 310
Removal for cause,..... 58, 62
Vacancy, how filled,..... 65, 105, 238
Power to establish schools,..... 73
Duty to call meetings,..... 9, 20, 77

PAGE.

Contract by one, when assent of others will be implied, ... 80, 250
Power to call meetings, ... 83
Office honorary — without pay, ... 84
Order to draw money, ministerial, ... 88
Cannot give and accept notice to themselves, ... 89
All must confer and consult together, in order to make their acts valid, ... 3, 9, 95
Reports from joint districts, ... 180
Annual reports, to whom made, ... 180
Should not be teachers, ... 99
Term of office, ... 236
Penalty for refusing to serve, ... 239
Resignations, to whom made, ... 239
Powers and duties, ... 241 to 267
How their powers must be exercised, ... 242
Calling special meetings, ... 244
Notices of meetings, ... 244
Making out tax lists, ... 244
Annexing warrant to tax list, ... 245
Purchase or leasing of sites and building house, ... 245
Custody of school-house, ... 246
Employment of teachers, ... 247, 249
Division of public money, ... 252
Exemption of indigent persons, ... 252
Payment of teachers, ... 251
Rate bill, how assessed, ... 254, 259
Repairs of school-house, ... 259
Fuel, tax for, ... 260
Blank books for inventory of property and for teachers' lists, ... 261
Teachers' list, ... 262
Power to levy tax without vote of district, ... 266
Assessment and collection of taxes, ... 267 to 301
Renewal of warrant, ... 298
Suit against supervisor for school moneys, ... 301
Annual reports of trustees, ... 301 to 317
Holding of district property, ... 313
Penalty for not rendering yearly account, ... 315
Suits for penalties, ... 316
Libraries under their care, ... 327
Colored children, school for, ... 343
Union free school law, ... 347
See title "Annual Reports."

TUITION:

Of boarder, who responsible for, ... 45, 255

TURNPIKE:

How to be assessed, ... 84, 269

UNION FREE SCHOOL LAW:

Pages ..... 347 to 357

UNITED STATES DEPOSIT FUND:

Income, ... 121

PAGE.

VACANCY:

When absence will amount to,..... 51
By reason of imprisonment,..... 53
In office of trustee, how filled,..... 65, 105, 238

VALUATION:

Where new valuation should be made,..... 17
Notice to be given of new vlauation,..... 44, 73
How ascertained,..... 282
Reduction,..... 284, 286

VOTERS:

Right to vote,..... 61
Who are legal voters,..... 67, 68, 81, 90, 209
Challenge of,..... 214
Residence,..... 207

VOTES, ILLEGAL:

When proceedings will be set aside for,..... 99

WARRANT:

Time of delivery to collector,..... 18